



Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory

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Lecture

ADMINISTRATIVE LAW IN THE 1930s: THE SUPREME COURT'S ACCOMMODATION OF PROGRESSIVE LEGAL THEORY

MARK TUSHNET[†]

ABSTRACT

In the first decades of the twentieth century, Progressive politicians and legal theorists advocated the creation and then the expansion of administrative agencies. These agencies, they argued, could address rapidly changing social circumstances more expeditiously than could courts and legislatures, and could deploy scientific expertise, rather than mere political preference, in solving the problems social change produced. The proliferation of administrative agencies in the New Deal—the SEC, the NLRB, and others—meant that defending administrative agencies from close judicial oversight became intertwined with defending the New Deal itself. In a series of contentious cases decided by the Hughes Court, Progressives believed that they had suffered loss after loss. And, counting only outcomes, they had. Yet by the end of the decade, the Court had moved administrative law closer to the position the Progressives had sought. This Lecture examines developments in administrative law in the 1930s. Focusing on three major cases during that decade, this Lecture describes how far administrative law adapted to the vision articulated

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by Progressive scholars, most notably Felix Frankfurter and James Landis. In each case, Progressives believed that the Court had substantially eroded the accomplishments of administrative law; but in each, Progressives were mistaken. And whereas the Progressives failed to acknowledge how much they had gained from the Supreme Court during the 1930s, by the end of that decade, their opponents better understood what had occurred and mobilized political support to retrench. Only a presidential veto stood in the way of a substantial revision of administrative law. That veto, though, allowed modern administrative law to adapt to the changing place of administrative agencies in the modern administrative state.

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INTRODUCTION

Between 1900 and 1930, Progressive politicians and legal theorists advocated the adoption and then the expansion of administrative agencies. These agencies could address rapidly changing social circumstances more expeditiously than could courts and legislatures, and could deploy scientific expertise, rather than

mere political preference, in solving the problems produced by social change. The Supreme Court initially was skeptical about the proposition that the new administrative state could fit easily into the American constitutional order. But by the time Charles Evans Hughes became Chief Justice in 1930, the Court had accommodated the administrative state, in part because the advocates for administrative agencies tempered their claims out of the prudential concern that seeking too much would lead the Court to reject the administrative state entirely.

Yet Progressive legal theorists never fully abandoned their defense of what Roscoe Pound pejoratively called “administrative absolutism,” and the economic crisis that began in 1929 gave them the opportunity to press aggressively forward. The proliferation of administrative agencies in the New Deal—the Securities and Exchange Commission (SEC), the National Labor Relations Board (NLRB), and more—meant that defending administrative agencies from close judicial oversight became intertwined with defending the New Deal itself.¹ In a series of contentious cases decided by the Hughes Court, Progressives believed that they had suffered loss after loss.² And, counting only outcomes, they had. Yet by the end of the decade, the Court had moved administrative law closer to the position the Progressives had sought.³ Ironically, by the time the Court had accommodated the Progressive theory of administrative law, the way agencies functioned in the political system was beginning to change. Interest-group bargaining—a form of politics—was relocated into administrative agencies, and the Progressive claim that administrative agencies pursued science rather than politics became difficult to sustain. The Progressive vision remained dominant, though, and its association with the New Deal produced a political reaction that resulted in the enactment of the Administrative Procedure Act in 1946.

This Lecture, part of a larger work in progress on the Supreme Court under Charles Evans Hughes, examines developments in administrative law in the 1930s. Part I lays out administrative law theory as articulated by Progressive scholars, most notably Felix Frankfurter and James Landis, and sketches some of the changes that scholars identified by the end of the decade. Part II turns to the

1. See *infra* Part II.A.

2. See *infra* Part II.B–D.

3. See *infra* Part II.E.

Supreme Court's decisions in the 1930s. After describing how far administrative law had adapted to the Progressive vision by 1930 and how it had changed by 1940, Part II examines three major cases in some detail. The discussions show how, in each case, Progressives believed that the Court had substantially eroded the accomplishments of administrative law, and how, in each, Progressives were mistaken. Part III describes the political reaction to developments in administrative law and practice, arguing that while the Progressives failed to acknowledge how much they had gained from the Supreme Court, their opponents mobilized political support to retrench. Only a presidential veto stood in the way of a substantial revision of administrative law. That veto, though, allowed modern administrative law to adapt to the changing place of agencies in the modern administrative state. The Lecture concludes with a brief observation about the shift from the Constitution to statutes as the means by which the administrative state would be controlled after 1940.

I. PROGRESSIVES AND ADMINISTRATIVE LAW: THE SCHOLARLY VIEW OF ADMINISTRATIVE AGENCIES

Progressive legal theorists defended the rise of the administrative state. For them, the rapidity of social and economic change rendered the traditional tripartite scheme of government outmoded: neither legislatures nor courts could respond quickly enough, or with enough expertise, to the problems generated by change. Progressives presented a vision of the administrative state less through a series of propositions than through an account of its inevitability and therefore its constitutionality. Their examination of the administrative state in operation led them to conclude that administrative agencies ought to be freed from close judicial supervision, at least if the agencies were reformed to fit the Progressives' model.

A. *Felix Frankfurter and James Landis on Administrative Law*

In 1930, Felix Frankfurter delivered the Dodge Lectures at Yale University. The lecture series was devoted to the "responsibilities of citizenship," and previous lecturers included distinguished public servants, such as then-Judge William Howard Taft in 1906 and Charles Evans Hughes in 1910. Frankfurter decided to speak on "The Public and Its Government," providing a summary of Progressive ideas about modern government and, in particular, on the necessity of

administrative rather than legislative regulation of the modern state.⁴ Eight years later, James Landis, a Harvard Law professor turned New Dealer turned dean at Harvard,⁵ gave the Storrs Lectures on “The Administrative Process,” also at Yale.⁶ The two sets of lectures provide bookends to the story told by Progressives of administrative law through the 1930s.

Frankfurter and Landis sounded some of the same themes early and late. The New Deal experience produced some modest revisions of those themes, hinting at the larger rethinking that was to come after 1941.

Frankfurter and Landis emphasized the rapidity of social and economic change. Frankfurter began with a description of the “new material forces” provoking “swiftly moving changes” in American society in the late nineteenth century and afterwards—population growth, urbanization, and the extension of the nation’s railroad network.⁷ Like Frankfurter’s, Landis’s story began early in the nineteenth century, when “the functions of government were limited essentially to the prevention of disorder, protection from foreign invasion, the enlargement of national boundaries, the stimulation of international trade, and the creation of a scheme of officials to settle civil disputes.”⁸

Next, they emphasized the inability of legislatures, political parties, and courts to respond adequately and promptly to that change. As Frankfurter put it, before 1887, state laws “dealt with simple situations in a simple way, most frequently forbidding whatever mischief revealed itself as needing more than individual corrective.”⁹ Frankfurter criticized the Court for limiting the ability of

4. FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* (1930).

5. See DONALD A. RITCHIE, JAMES M. LANDIS: DEAN OF THE REGULATORS 29–42, 79 (1980).

6. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

7. FRANKFURTER, *supra* note 4, at 7–10. He also wrote, “Following the Civil War there was an almost magical industrial growth,” and “[v]ast physical forces have produced great social changes.” *Id.* at 23. Measuring social change by the number of patents issued and laws enacted, Frankfurter observed that the creation of the Interstate Commerce Commission (ICC) in 1887 “dates the break with the simplicities of the past” and “begins the new era of governmental regulation and administrative control.” *Id.* at 25.

8. LANDIS, *supra* note 6, at 6. He continued by observing that industrialism and “the rise of democracy” caused “social maladjustments,” which required rectification. *Id.* at 7–8.

9. FRANKFURTER, *supra* note 4, at 14–15. Frankfurter understood that party government meant patronage government, which he contrasted with the Progressive ideal of government by experts: “[t]he interplay between government and the complicated structure of industrial society

states to innovate. "The states need the amplest scope for energy and individuality in dealing with the myriad problems created by our complex industrial civilization. They need wide latitude in devising ways and means for paying the bills of society and in using taxation as an instrument of social policy."¹⁰ Elaborating on the difficulties presented to traditional institutions, Landis described legislative efforts to regulate directly by enacting statutes addressing specific problems.¹¹ These statutes, though, were "crude and useless," and were always too late, addressing problems that had often faded into insignificance by the time legislatures acted.¹² Common law remedies administered in the courts were not much better, by Landis's account. Depending on the initiative of aggrieved parties or public prosecutors, these remedies "were more apparent than real because of the costly and uncertain character of the legal actions that had to

demands as never before men of independence and disinterestedness in public life." *Id.* at 34–35.

10. *Id.* at 48. For Frankfurter, against the "drastic transformation" in the late nineteenth century, "members of the Supreme Court continued to reflect the social and economic order in which they grew up." *Id.* at 44–45. Because "[t]hey sought to stereotype ephemeral facts into legal absolutes," they wrote "abstract conceptions concerning 'liberty of contract' . . . into constitutional dogmas." *Id.* at 45. Although the Court's "hostility to legislation reached its crest" in *Lochner v. New York*, 198 U.S. 45 (1905), and then receded, "those who had hoped that this deeper insight . . . into the realities of modern society would endure, were to be disappointed." FRANKFURTER, *supra* note 4, at 46. Frankfurter observed that the Court since 1920 had "invalidated more such legislation than in the fifty years preceding," and "always by a divided Court, always over the protest of its most distinguished minds!" *Id.* at 47.

Frankfurter's critique of the Supreme Court was comprehensive: the Court's decisions on federalism, substantive limitations on government power, and separation of powers all failed in devising constitutional rules allowing government to respond to "[o]ur rapid industrialization" and "[t]he pressure of practical necessities." *Id.* at 66. To Frankfurter, "Government means experimentation," and "[o]ppportunity must be allowed for vindicating reasonable belief by experience." *Id.* at 49. The Supreme Court's "veto power . . . over the social-economic legislation of the states . . . is the most vulnerable aspect of undue centralization." *Id.* at 50. It was

at once the most destructive and the least responsible: the most destructive, because judicial nullification . . . stops experimentation at its source, and bars increase to the fund of social knowledge by scientific tests of trial and error; the least responsible, because it so often turns on the fortuitous circumstances which determine a majority decision and shelters the fallible judgment of individual Justices, in matters of fact and opinion not peculiarly within the special competence of judges, behind the impersonal dooms of the Constitution.

Id. at 50–51. A single Justice's "tip of . . . mind or . . . fears[] may determine the opportunity of a much needed social experiment to survive, or may frustrate for a long time intelligent attempts to deal with a social evil." *Id.* at 51.

11. See LANDIS, *supra* note 6, at 9 (noting the failure of early legislative attempts to regulate railroad charges and tariffs).

12. *Id.*

be pursued.”¹³ Courts’ sporadic interventions left them unable “to maintain a long-time, uninterrupted interest in a relatively narrow and carefully defined area of economic and social activity.”¹⁴ The adjustments that were needed, Landis wrote, “could not be achieved through the intermittent intervention of the judicial process.”¹⁵ For Landis, “The administrative process [was], in essence, [his] generation’s answer to the inadequacy of the judicial and the legislative processes.”¹⁶

They insisted that experts should lead in making policy through modern administrative agencies. The solution to the problems of responding to rapid change was “a permanent, professional administrative agency” that could deal with “the demands of law upon economic enterprise” through “the continuity of study, the slow building up of knowledge, the stimulation of experiments”—“new political inventions responsive to the pressure of new economic and social facts.”¹⁷ As Landis put it, administrative agencies could provide “continuing concern with and control over the economic forces which affect the life of the community.”¹⁸

13. *Id.*

14. *Id.* at 30.

15. *Id.* at 9.

16. *Id.* at 46. As another student of administrative law put it, “the inadequacy of the common-law processes and . . . the shortcomings of direct statutory regulation” produced the modern administrative agency. 1 I.L. SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE* 287 (1931).

17. FRANKFURTER, *supra* note 4, at 72–73, 88. Railroad and utility regulation provided Frankfurter’s examples. *See id.* at 83–88 (outlining how States followed Congress’s establishment of the ICC by establishing independent administrative bodies to overcome “[t]he incapacity of the existing system of regulation to cope with revealed abuses and the emergence of new forms of public services”). Public-utility regulation was “perhaps the most significant political tendency at the turn of the century,” because it responded to “the political influences [the utilities] exerted, the technological advances,” and, perhaps most important, “the feebleness of existing machinery and procedure for control.” *Id.* at 83. States and then the national government developed new “instruments and processes through which sound relations between public utilities and the public could work themselves out.” *Id.* at 86. They created “nonpolitical administrative agenc[ies] . . . , presumably expert and disinterested and equipped with the necessary technical aid, charged with securing to the public at reasonable cost services adequate according to modern technological standards and assuring to the utilities a fair income to make possible these services.” *Id.* at 86–87. When the regulated industries raised constitutional challenges, “[h]appily, statesmanship triumphed,” with state courts and the Supreme Court finding constitutional doctrine “adaptable to the new exigencies of government” and rejecting the argument that these new “devices” were unconstitutional “merely because [they] exercised functions which, as a matter of logical analysis, partook of all three forms of governmental power.” *Id.* at 87–88.

18. LANDIS, *supra* note 6, at 8.

[E]xpertness . . . springs only from that continuity of interest, that ability and desire to devote fifty-two weeks a year, year after year, to a particular problem. . . . [T]he art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy.¹⁹

They rejected close judicial oversight of agency decisions.²⁰ For example, the Court had required that rates provide a fair return on investment, which Frankfurter thought rested on “essentially economic” premises, but “no judicial pronouncements upon matters fundamentally economic run so counter to the views of economists as do the more recent utterances of the Supreme Court,” which were “based upon unrealities, [were] financially unsound, and [led] to uncertainty and speculation.”²¹

They understood that existing agencies did not conform to their ideal, but both sought internal reform of administrative agencies rather than substantial external supervision, especially supervision by

19. *Id.* at 23–24; *see also id.* at 152 (“Our desire to have courts determine questions of law is related to a belief in their possession of expertness with regard to such questions.” (emphasis omitted)).

20. “[T]he tendency over the past few decades has been to decrease rather than to increase the power of judges to impose checks upon the exercise of administrative power.” *Id.* at 100; *see also id.* at 142 (“[T]he expertness of the administrative, if guarded by adequate procedures, can be trusted . . .”).

To Frankfurter, the Court’s doctrines on separation of powers were somewhat less vulnerable to criticism than its due process holdings. *See FRANKFURTER, supra* note 4, at 77. The “shrewd men of the world who framed the Constitution” knew that doctrine had to give political actors “latitude . . . in a work-a-day world,” and, “barring some recent decisions,” the Court had agreed, refusing “to draw abstract analytical lines of separation” and recognizing “necessary areas of interaction among the departments of government.” *Id.* at 77–78. This allowed Congress “to move with freedom in modern fields of legislation, with their great complexity and shifting facts, calling for technical knowledge and skill in administration.” *Id.* at 78. He concluded his second 1930 lecture with the observation that “[e]nforcement of a rigid conception of separation of powers would make modern government impossible.” *Id.* But, Frankfurter continued, “pessimism has supplanted the earlier feeling of hope.” *Id.* at 92. The catalogue of difficulties was long, including the “failure . . . to reflect decreased operating costs[,] . . . the costly futility of rate proceedings[,] . . . [and the] failure to exercise skilled initiative in the promotion of the public interest”—all leading to an increase of “the impotence of the individual” and the diminution of “the mastery of law over these enterprises.” *Id.* at 93. Nonetheless, “the current judicial approach” was at “[t]he heart of the difficulty.” *Id.* at 101.

21. *Id.* at 101–03.

the courts.²² For Frankfurter, the agencies themselves were unable to cope with the tasks they had been given.²³ Part of the difficulty lay with legislatures, which had not given the agencies the support they needed: “[t]he men intrusted with the task ha[d] almost everywhere been overburdened by details, inadequately staffed, denied necessary technical aid, subjected to short tenures, dependent on meager salaries, and generally restricted to appropriations which produce humdrum routine.”²⁴ With a Progressive’s confidence that merely exposing difficulties in government would lead to reform, Frankfurter called not for a re-imagining of how administrative agencies could operate in the “work-a-day” world,²⁵ but for reinvigorating the Progressive ideal:

The complex problems of regulation call for a governmental agency qualified by experience, fortified by technical assistance, free from the pulls and pressures of politics, generating an esteem in the public such as the public now entertains for the judiciary, a public esteem which in its turn will arouse in these officials enterprise, courage, and devotion to the public good.²⁶

22. Legislatures had allowed “too many mediocre lawyers” to be “appointed for political considerations,” and had treated agencies “not as means for solving difficult problems of government, but as opportunities for political advancement or more profitable future association” with the regulated industries. *Id.* at 114. Though “utility regulation at its best call[ed] for fresh energy and newer resources to cope with the new and greater tasks that now confront it,” there was “inequality in *expertise*, in will, in energy, in imagination, between the utilities and government.” *Id.* at 112–13. Looking at agency personnel, Frankfurter observed that “[e]xcept for occasional men of great capacity and exceptional devotion to the public interest, the technical staffs of the commissions, their engineers and accountants, [were] . . . no match for the experts against whom they [were] pitted.” *Id.* at 115. Taking the relatively new Federal Power Commission as his example, Frankfurter argued that “a few subordinates, subjected to great temptations and with appropriations from Congress so meager as to starve their efforts, [were] hardly equipped to meet complacency and legalism within the Commission and the pressure of acute and powerful forces without.” *Id.* at 119–20. Frankfurter noted that “one of the patent facts about our system” was “[t]hat the level of professionalism, of trained capacity, in our administration of criminal justice is very low.” *Id.* at 154–55.

23. *Id.* at 112–13.

24. *Id.* at 113.

25. *Id.* at 77.

26. *Id.* at 122. One of Frankfurter’s students had expressed his own skepticism about staffing administrative agencies:

In the long run, and until current ideals of public service change very radically, it cannot be expected that a government commission, paying modest salaries and exposed to the vicissitudes of political life, can command the services of those supermen whose decisions are always made of the substance of justice and wisdom

GERARD C. HENDERSON, *THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE* 328 (1924). James Landis noted that “trial examiners’ staffs on the

Perhaps most important, Frankfurter and Landis worried that expert administrative agencies—however effective they were as instruments of governance—might lack democratic legitimacy. Both men struggled to articulate accounts that explained why agencies were indeed properly democratic. Frankfurter's fourth and final lecture sought to explain how the Progressive vision of modern government through expert agencies comported with democratic ideals. Glancing at Soviet Russia and fascist Italy, Frankfurter described democracy as relying on "more plodding popular institutions."²⁷ But "democracy is the reign of reason on the most extensive scale. It seeks to prevail when the complexities of life make a demand upon knowledge and understanding never made before"²⁸ Resolving the deeper problems of American government required a new understanding of democracy. Because "the staples of contemporary politics . . . are deeply enmeshed in intricate and technical facts," they "must be extricated from presupposition and partisanship."²⁹ Instead, the nation needed "systematic effort to contract the area of conflict and passion and widen the area of accredited knowledge as the basis of action."³⁰

Frankfurter disclaimed the possibility that he was "suggesting that the conquest of science calls for a new type of oligarchy, namely,

whole have too little competence" because of low salaries and "the rigid requirements of civil service rules." LANDIS, *supra* note 6, at 104.

27. FRANKFURTER, *supra* note 4, at 123. Frankfurter praised the British system of a permanent and prestigious civil service for eliciting "talent . . . [in] public administration," but noted that "it is wholly wrong to expect civilized standards of public service from officials whose salaries are too low to enable them to meet the minimum standards of cultivated life." *Id.* at 136, 139. Adapting that system to the United States would mean that "government [would] have at its disposal the resources of training and capacity equipped to understand and deal with the complicated issues to which these technological forces give rise." *Id.* at 151. For Frankfurter, the American spoils system reflected "a crude logic of democracy and the versatile energy of the pioneer," but was inadequate "in the modern world," which required more than "the simple virtues of honesty and public devotion." *Id.* at 147, 150.

28. *Id.* at 127.

29. *Id.* at 152.

30. *Id.* As Frankfurter acknowledged, "[A]gitation and advocacy have their place." *Id.* at 153. They were

instruments of education, means for making effective the findings of knowledge and the lessons of experience. But the quiet, detached, laborious task of disentangling facts from fiction, of extracting reliable information from interested parties, of agreeing on what is proof and what surmise, must precede, if agitation is to feed on knowledge and reality, and be equipped to reach the mind rather than to exploit feeling.

Id.

government by experts.”³¹ For him, “power . . . *must* more and more be lodged in administrative experts,” and therefore had to be “properly circumscribed and zealously scrutinized.”³² This could be done “through machinery and processes,” but, strikingly, these were not the traditional machinery and processes of law.³³ Nor were they the processes of politics:

In a democracy, politics is a process of popular education—the task of adjusting the conflicting interests of diverse groups in the community, and bending the hostility and suspicion and ignorance engendered by group interests toward a comprehension of mutual understanding. For these ends, *expertise* is indispensable. But politicians must enlist popular support for the technical means by which alone social policies can be realized.³⁴

Rather, the agencies’ democratic legitimacy “largely depend[ed] on very high standards of professional service, an effective procedure . . . , easy access to public scrutiny and a constant play of alert public criticism, especially by an informed and spirited bar.”³⁵ These “instruments for governing”—“organization, technological skill, and scientific methods”—were the means by which the end, “the art of making men live together in peace and with reasonable happiness,” could be pursued.³⁶

31. *Id.* at 157.

32. *Id.* at 157–58 (emphasis added).

33. *Id.* at 159–60.

34. *Id.* at 161.

35. *Id.* at 159.

36. *Id.* at 160. “[I]mproving the personnel of administrative agencies” might be desirable, but until it was accomplished, agencies might lack sufficient democratic justification. Ralph F. Fuchs, *Concepts and Policies in Anglo-American Administrative Law Theory*, 47 YALE L.J. 538, 567 (1938). Justice Brandeis had observed that “[r]esponsibility is the great developer of men. May it not tend to emasculate or demoralize the rate-making body if ultimate responsibility is transferred to others?” *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 92 (1936) (Brandeis, J., concurring). For Robert Cooper, the very existence of judicial oversight created a “vicious circle” in which “the existence of mediocrity” was “caused, at least in part, by the existing tendency to subordinate administration to a place of inferiority within the framework of government.” Robert M. Cooper, *Administrative Justice and the Role of Discretion*, 47 YALE L.J. 577, 601 (1938). Why, he asked, would “men of ability and competence” want to work in “such positions of questionable responsibility”? *Id.* “[M]aking authority coextensive with responsibility” would, Cooper suggested, improve the quality of the personnel in place even without any additional actions by the legislature. *Id.* Only this would preserve “popular government” from degenerating into “a more efficient form of political authority,” one that might “sacrific[e] fundamental political ideals.” *Id.* at 601–02.

Progressives grudgingly accommodated the courts in the early years of modern administrative law. The new administrative agencies faced courts suspicious of the substantive policies the agencies had been told to pursue and of the lawyers determined to retain lucrative business. The agencies responded by giving their procedures a judicial form—for example, holding hearings at which evidence was taken and placing limitations on the use of hearsay evidence.³⁷ But to Progressives, agency proceedings could not be fully “judicialized” without losing the advantages of expertise and relatively quick responses to new problems. The Progressives were willing to go part of the way toward procedures resembling those in judicial proceedings, but their concessions were never enthusiastic. They wanted to insulate the modern administrative state from judges supervising the agencies and imposing court-like procedures on them, and from lawyers who lacked the comprehensive overview of the economic or social problems within each agency’s jurisdiction.³⁸

B. I.L. Sharfman on Administrative Law in the Interstate Commerce Commission

Frankfurter’s lectures described the ideal administrative state. He knew that the reality in the United States was far from ideal. Frankfurter’s studies of administrative law led him to support a research project by the Commonwealth Fund. The Fund commissioned a series of studies of administrative law—“the extent to which administrative control has, by modern regulation, been in fact conferred.”³⁹

37. See LANDIS, *supra* note 6, at 141–42 (describing the “great emphasis” Justice Brandeis placed on the “quasi-judicial” nature of “administrative tribunals”).

38. See *supra* notes 17–20.

39. Foreword to 1 SHARFMAN, *supra* note 16, at v. The Fund was founded in 1918 by Anna Harkness, the widow of one of the founders of Standard Oil Company. *Commonwealth Fund Spent \$2,095,911 in 1930*, N.Y. TIMES, Feb. 16, 1931, at 28. It generally focused on supporting public health, including grants to New York’s social work agencies. *Id.* During the 1920s, a small portion of its funds was devoted to legal research, supervised by a committee chaired by George Welwood Murray, a prominent New York lawyer and an active alumnus of Columbia Law School. 1 SHARFMAN, *supra* note 16, at vi. Other committee members included three law school deans—Roscoe Pound of Harvard, Young Smith of Columbia, and Henry Bates of Michigan—and the influential Wall Street lawyer Charles C. Burlingham. *Id.* For an examination of Frankfurter’s influence on the Commonwealth Fund’s conceptualization of administrative law, see generally Daniel R. Ernst, *Ernst Freund, Felix Frankfurter, and the American Rechtsstaat: A Transatlantic Shipwreck, 1894–1932*, 23 STUD. AM. POL. DEV. 171 (2009). The Fund’s Legal Research Committee described its interests in classic Progressive terms:

Gerard C. Henderson, a Frankfurter protégé, wrote the Fund's first volume, on the Federal Trade Commission (FTC).⁴⁰ Less than a decade old when the book was published in 1924, the FTC had struggled to establish coherent antitrust policy. And Henderson's book, largely a pedestrian catalogue of the FTC's work whose recurrent theme was that the FTC's decisions rarely explained its conclusions adequately, did little to support the Progressive vision of modern administrative law.

Henderson offered the Progressive vision as part, but only part, of his story about the FTC's creation. He described the arguments made by Progressive supporters of new legislation sympathetically,⁴¹ but, he observed, the Progressive impulse was only one of two strands of support for creating the FTC.⁴² The other was supplied by "business men, trade associations, and commercial and industrial interests to whom the uncertainty of the law had become exasperating."⁴³ The FTC's work, Henderson suggested, was hampered by the conflict inherent in its creation.⁴⁴ In area after area, the Commission failed. Henderson thought an expert agency should be able to make factual findings about an industry that a court could not, but the FTC's findings were of "meagre quality."⁴⁵ The "net result" of the FTC's cases dealing with contracts between manufacturers and dealers was "substantially nil," with findings that

The vast changes wrought in the social and economic aspects of society during the nineteenth century, due to the introduction of new mechanical forces, the penetrating influence of science, large scale industry and progressive urbanization have reflected themselves in a steady extension of legal control of social and economic interests.

HENDERSON, *supra* note 26, at v. At first, legislatures tried to intervene through statutes "depending . . . for enforcement upon the rigid, cumbersome and inevitably ineffective machinery of the criminal law." *Id.* Administrative "instruments," which "greatly widened the field of discretion," were the new mode of regulation. *Id.* The Fund's project involved examining "the actual workings of carefully selected administrative organs . . . [as] a prerequisite for an appraisal of what administrative law really does." *Id.* at vi–vii.

40. HENDERSON, *supra* note 26.

41. *Id.* at 18–19 ("The forms of unfair and oppressive competition are myriad. By the time Congress has discovered and defined a dozen, a dozen more will be devised and put in operation. A tribunal should be created, with power to mold and adapt the law to each new situation. Since business and economic problems will be encountered, as well as questions of law, the power should be lodged with a commission composed of eminent lawyers, economists, business men, and publicists . . .").

42. *Id.* at 17.

43. *Id.*

44. *See id.* at 83–87 (noting that the Commission neither maintained judicial independence nor provided promptness and speed).

45. *Id.* at 116.

“appear[ed] to be peculiarly barren of the fruits of economic research and understanding, and to an unusual degree the products of legalism and dogma.”⁴⁶ And, betraying a core premise of the Progressive case for administrative agencies, “the Federal Trade Commission [was] not primarily built for speed”⁴⁷ because of its judicialized procedures—themselves the product of the compromise between Progressives and commercial interests.⁴⁸

Henderson offered a bleak picture of the administrative state in action. But it was not the only picture available to Progressives like Frankfurter. At the end of the 1930s, Frankfurter urged his Harvard colleagues to award that year’s James Barr Ames Prize for the best book on law to another product of the Commonwealth Fund project, lawyer-economist Isaiah Leo Sharfman’s comprehensive treatise on the Interstate Commerce Commission (ICC). Calling it “a monumental work,” Frankfurter told his colleague Zechariah Chafee that Sharfman’s work offered a “perspective” on “the whole domain of what we call administrative law.”⁴⁹

For Frankfurter, Sharfman’s work exemplified the Progressive understanding of administrative law after a half decade of New Deal experience. It offered a positive case for the administrative state to offset Henderson’s skepticism. Sharfman was a meticulous scholar⁵⁰ who eventually wrote five volumes on the ICC. The first of these, published in 1931, reflected the Progressive vision in almost pristine form. By 1937, when the final volume appeared, Sharfman’s perspective had shifted subtly as New Deal experience accumulated. But even in the final volume, he defended the Progressive vision of administrative law in almost the same terms that Frankfurter had used in 1930.

46. *Id.* at 316–17.

47. *Id.* at 86.

48. *Id.* at 17.

49. Letter from Felix Frankfurter to Zechariah Chafee (Mar. 11, 1939) (on file with the Harvard Law School Special Collections Library).

50. Born in Russia in 1886, Sharfman graduated from Harvard College in 1907 and from the Law School in 1910. HARVARD COLLEGE CLASS OF 1907: SECRETARY’S REPORT NO. III, 1907–1913, at 267 (1913). In 1912 the Chinese revolution forced Sharfman to give up his teaching post in China in law and political science to take a job on the staff of the National Civic Federation studying the regulation of public utilities. *Id.* Appointed in 1913 to lecture on political economy in the economics department at the University of Michigan, Sharfman remained at Michigan until his retirement in 1955. *Isaiah L. Sharfman, Economist, Teacher*, N.Y. TIMES, Sept. 10, 1969, at 47.

Sharfman's work was a comprehensive overview of the ICC's work from 1887 to the 1930s, filled with long excerpts from Commission decisions and reports, and from Supreme Court opinions. On its opening pages, the work stated the Progressive explanation for the rise and value of administrative agencies: "the very existence of an expert and continuously functioning body has facilitated the evolution of governmental policies responsive to public needs and realistically adjusted to meet those needs."⁵¹ He concluded his third volume, published in 1935 and affected by the role of administrative agencies in the early New Deal, with a reflection on the possibility that the ICC would make "a courageous use of regulatory machinery" as it had in the past.⁵² The ICC, he suggested, "may be blazing trails and accumulating experience, in a degree never suspected in 1920, toward a fuller public control of all industry."⁵³

Though the ICC was the model modern administrative agency, it was not perfect. Sometimes its commissioners erred. Most often their mistakes were not intrinsic to the administrative enterprise. So, for example, Congress might have asked them to address a discrete problem whose solution would interfere with the comprehensive regulatory system the ICC generally pursued.⁵⁴ Or the ICC might have misstepped because Congress had refused to give it the resources it needed to do its job.⁵⁵ On a more general level, the agency's "determination to do 'a common sense job' was quite in accord with the [ICC's] generally pragmatic processes. In terms of any

51. 1 SHARFMAN, *supra* note 16, at 2. Sharfman repeated these views throughout his work, to ensure that a reader confronting volume two or four would learn what the reader who had started with volume one already knew. The fourth volume, for example, opened with a reference to the "constantly changing circumstances and conditions" under which the "development of regulatory policy could not have been achieved without resort to the administrative method of control." 4 *id.* at 5 (1937).

52. 3A *id.* at 627 (1935).

53. *Id.* Sharfman was quite lavish with his praise of the Commission's work. He offered "high commendation" to the Commission's "successful attack" on "palpably indefensible forms of favoritism." 3B *id.* at 755 (1936). The agency's work during World War I was "sufficiently impressive to establish the need of removing the traditional legal obstacles to concert of action." 1 *id.* at 173.

54. See 1 *id.* at 225–27. A congressional directive to require that railroads provide "interchangeable mileage or scrip coupon tickets" was "passed largely under the pressure of commercial travelers' organizations," and "the fact that Congress has sought, directly, to further special ends, may exert an unwholesome influence upon the independence of the Commission and upon the dominance of the method of administrative control." *Id.* at 226–27.

55. See *id.* at 9 ("Both thoroughness of consideration and promptness of decision, which are presumed to characterize the administrative method of control, tend to become very difficult, if not impossible, of attainment.").

absolute standard of accuracy, there was doubtless error; but such error was not grounded in arbitrary procedure, nor did it issue in flagrant departure from fact.”⁵⁶

Occasionally, though, Sharfman hinted at, and may even himself have glimpsed, deeper difficulties with the administrative enterprise. The ICC’s core mission was to create a rational regulatory system for railroads, setting prices and determining routes that promoted national well-being.⁵⁷ Most of that work involved economics—using accounting principles to determine the present value of past capital investments or the replacement cost for existing capital.

Sharfman also believed the ICC could have used economic science to determine the proper rate of return on investment. The difficulties the ICC encountered in doing so were technical, not normative. Sharfman understood that, in Congress’s view and the ICC’s, national well-being included more than mere economics. It included safety and providing access to rail transportation to otherwise isolated communities. Sharfman knew that integrating these “broad social ends” within an economically rational system plainly lay outside the domain of economic science and might undermine such a system: safety regulations, for example, had effects on the quality and cost of service, the ICC’s primary focus.⁵⁸ In effect, Sharfman threw up his hands, observing that the ICC had sensibly given relatively little weight to such social considerations. He did not seem to think that the ICC’s experience in this area had cast any doubt on the Progressive enterprise of deploying science and expertise in administrative agencies.

Sharfman’s enthusiasm for administrative agencies gave him strong views about other organs of government. For him, all that Congress, the Executive Branch, and the courts could do was interfere with the agency’s use of science and expertise. Congress had one positive role: it could create an administrative agency and then delegate authority to it in the broadest terms.⁵⁹ Otherwise, Congress

56. 3A *id.* at 164–65 (1935).

57. 1 *id.* at 3–5.

58. *Id.* at 248.

59. Sharfman understood that “[t]he very existence and jurisdictional scope of these administrative agencies is dependent upon and constantly subject to modification by statutory enactment” and that the ICC was “constantly performing legislative functions . . . guided by the standards of action prescribed by Congress.” *Id.* at 287. But, he continued, “these standards are usually couched in such generality of terms as to leave open an almost uncharted discretion in the disposal of specific proceedings.” *Id.* at 7. The ICC was to determine whether rates were

had only negative effects on the administrative process. Prodded by narrow interest groups that lacked the comprehensive overview the ICC had, Congress would direct the ICC to solve some quite isolated problem. The ICC's expertise often did not extend to the problem turned over to it, and even when the problem was generically appropriate, addressing it would undermine the ICC's comprehensive plan for the railroad industry.⁶⁰ The ICC's "tasks" were "so intimately intertwined" that "the more or less arbitrary infusion of extraneous influences, however well intentioned, [was] bound to render difficult the maintenance of unswerving adherence to reasoned conclusions and permanently significant standards of action."⁶¹ Sharfman understood the ICC's "apparent sidetracking" of action in response to a congressional directive, though he could not bring himself to approve the "deliberate disregard of the legislative will."⁶² Sharfman's skepticism about what Congress could contribute to the modern administrative state suggests that, for him, the best world would be one in which administrative agencies came into being by immaculate conception.

The presidency was no better. Presidents tried "to mold the general course or direction of regulatory policy through manipulation of the appointing power."⁶³ They assumed that "the Commission [was] part of the national administration and hence [was] a proper medium for the expression of political policy."⁶⁴ But it was not—no more so than was the Supreme Court—"and executive influence [was] as manifestly out of place in the one case as it would be in the other."⁶⁵ Sharfman thought that presidents should appoint experts to agencies, but too often they allowed narrow political considerations—

"just" and "reasonable" and in "the public interest," but there were "no objective and definitive tests of 'justness,' or 'reasonableness,' or 'public interest.'" *Id.* But "[w]ithin the bounds of such vaguely defined ends, the Commission . . . exercise[d] virtually unrestricted authority." *Id.* at 287–88. The absence of such objective tests ensured that the agency would have the flexibility needed to adapt solutions to ever-changing problems, and Congress had become accustomed to granting the agency such broad powers because "in great measure" it had been persuaded by the ICC's "experience" and "influence" that broad delegations promoted the public good. *Id.* at 2.

60. See, e.g., *id.* at 229–30 (discussing Congress's interest in the transport of agricultural products).

61. *Id.* at 230–31.

62. 3A *id.* at 482 (1935).

63. 2 *id.* at 453.

64. *Id.*

65. *Id.* at 454.

geography being the most important one for the ICC—to dictate choice.⁶⁶ He had generally high regard for the ICC’s members, yet for him it was simply a happy coincidence that politics converged with expertise often enough. Nor did presidents provide the public support for the agency that it needed to become as important in the public’s mind as the courts were. Instead of urging that the public accept whatever the agency did as the result of the honest application of expertise, presidents evaluated the ICC’s work independently, on the merits rather than deferentially, and once again with politics primarily in mind.⁶⁷

In Sharfman’s view, the courts, too, should have been kept away from administrative agencies. Courts saw the ICC’s work only when someone brought an appeal challenging an agency decision. That meant that they did not see how the agency was operating overall or how a particular decision, which might to an outsider seem questionable, fit into a larger scheme the ICC had developed. The early ICC “was hindered by the open hostility of the railroads and the unsympathetic attitude of the courts.”⁶⁸

Fortunately, the era in which the courts were deeply hostile to administrative agencies had passed, and they had come to accept agencies as valuable instruments of modern governance.⁶⁹ Constitutional doctrine was far more generous to the ICC than it had been in the agency’s early years—though not, in Sharfman’s eyes, quite generous enough. Thankfully, “the courts [had] adopted a dominantly self-denying attitude in matters of review,” although Sharfman could not resist observing that this “was not characteristic of the Commission’s status during the first two decades of its existence.”⁷⁰ When the courts looked at agency procedures, their sporadic interventions were rarely helpful, and Sharfman commended

66. *See id.* at 458–65 & nn.211–14 (describing incidents in which presidential administrations were alleged to have unduly emphasized political considerations in the appointment of ICC personnel).

67. *See, e.g., id.* at 455–58 (discussing examples from the Harding and Hoover administrations).

68. 1 *id.* at 23–24.

69. *See, e.g., id.* at 7 (“Through a self-denying interpretation of their own functions in the prevailing scheme of control . . . the courts have progressively narrowed the scope of judicial review.”).

70. 2 *id.* at 385.

the ICC for going to Congress for relief when judicial decisions had “left serious gaps in the Commission’s functioning jurisdiction.”⁷¹

Sharfman published his final volumes after the nation had seen how some early New Deal agencies operated, and the later books had a slightly more skeptical and less enthusiastic tone than the first volumes. Modern conditions, it seemed, deprived administrative agencies of the very advantages over courts and legislatures—the ability to take a comprehensive view and the ability to respond quickly to changing circumstances—around which Progressives had organized their defense of those agencies. Sharfman criticized the ICC for its “[f]ailure [during World War I] to recognize the seriousness of the war emergency,”⁷² and for ignoring “the practical needs of the railroad situation during the critical years that were ushered in by the World War.”⁷³ He acknowledged that “[b]road adjustments [had] proved to be extremely complex and very difficult to carry out. They [were] too time-consuming to meet pressing demands and when completed changed circumstances [might] undermine their applicability.”⁷⁴ Responding in part to political challenges to the New Deal’s administrative apparatus and in part to their new understanding of how agencies actually operated, the Progressives’ heirs began to offer a more chastened view of the modern administrative state.⁷⁵

C. Freund and Dickinson on Administrative Law: Review of Law and Review of Facts

Early in the twentieth century, Ernst Freund imported continental ideas about administrative law to the United States. Trained in Germany, Freund taught at the University of Chicago Law School, and, during the 1910s and early 1920s, he was the leading figure in the field of administrative law.⁷⁶ Freund’s scholarship focused on using law to bring administrative discretion under control.

71. *Id.* at 423.

72. 3B *id.* at 92 (1936).

73. *Id.* at 94.

74. *Id.* at 765.

75. See, e.g., Herbert Hovenkamp, *The Mind and Heart of Progressive Legal Thought*, 81 IOWA L. REV. 149, 158 (1995) (noting that 1960s intellectuals “began to argue that regulatory agencies were costly to operate and often prone to error”).

76. Frankfurter surpassed Freund as the 1920s proceeded. For an account of the intellectual and institutional competition between Freund and Frankfurter, see generally Ernst, *supra* note 39.

Legislatures would exercise that control in the first instance by carefully delineating the domain of administrative discretion. Freund had great hopes for legislative control of administrative discretion, but he understood that some discretion would always remain with administrative agencies. They could comply with the rule of law, Freund thought, by incrementally moving from broad discretionary standards to more precise rules, and indeed perhaps even better rules than the legislature could devise.⁷⁷ For Freund, this was the model of how the rule of law would operate in the administrative state: careful delegation of power by legislatures, coupled with the elaboration of rules by agencies themselves.

Administrative law in the United States adopted part of Freund's solution, as courts tried to insist that legislatures give real guidance to administrative agencies. But by the 1920s, that effort had largely failed, as Freund may have understood. Yet American administrative law barely had a theory of administrative self-regulation—rules generated within agencies that would govern their own activities and that would fit agencies into a rule-of-law regime. Instead, U.S. administrative law unquestioningly accepted another part of the late-nineteenth-century compromise: courts would have full power to review agencies' decisions interpreting the law those agencies were administering. Frankfurter's students chastised Freund for advocating strict legislative control of administrative discretion, without fully appreciating Freund's admittedly secondary mechanism of evolving rules from standards.⁷⁸

Unrestricted judicial review of agency legal interpretations, though, was in tension with the vision of administrative autonomy held by Progressive theorists. Unsurprisingly, the Supreme Court,

77. Ernst Freund, *The Substitution of Rule for Discretion in Public Law*, 9 AM. POL. SCI. REV. 666, 669, 671–72 (1915) (“Administrative action has . . . the indisputable . . . advantage, that it permits the process of establishing rules to be surrounded by procedural guaranties and other inherent checks which will tend to produce a more impartial consideration than the legislature is apt to give, and [this] should in course of time, if not immediately, substitute principle for mere discretion. . . . [Agencies would] evolve principle out of constantly recurrent action.”).

78. John Dickinson, Book Review, 22 AM. POL. SCI. REV. 981, 985 (1928) (reviewing ERNST FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY: A COMPARATIVE SURVEY* (1928); JOHN PRESTON COMER, *LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES* (1927)) (criticizing Freund for treating administrative discretion as “of necessity inherently bad, and [assuming] that all questions can be justly decided by the yard-stick of fixed rules”). For other criticisms by Frankfurter's students, see Ernst, *supra* note 39, at 184.

protective of the judicial role, provided little help for Progressive theorists seeking to develop an account of agency autonomy over interpreting statutes. Still, by the end of the 1930s, Progressive theorists began to glimpse a path to such autonomy. They argued, and the Court came to agree, that agencies should have substantial leeway in determining *facts*. But, as John Dickinson had urged in his 1927 treatise on administrative law, the distinction between facts and law was vague, and drawing it inevitably implicated the very policy questions that Progressive theorists believed the agencies themselves should decide. For Dickinson, it was impossible “to establish a clear line between so-called ‘questions of law’ and ‘questions of fact’ by any substantive test of definition.”⁷⁹ Rather, “[A]ny factual state or relation which the courts . . . regard as sufficiently important to be made decisive for all subsequent cases of similar character becomes thereby a matter of law”⁸⁰ Administrative agencies applied general standards to “bridge[] th[e] gap” between “the special subsidiary facts . . . and the ultimate conclusion.”⁸¹ Doing so *was* factfinding. The theorists pressed hard to move the line dividing facts from law, seeking to place as much as they could in the domain of facts and therefore to guard against aggressive judicial scrutiny. They achieved little before the early 1940s.

D. A New Vision Begins to Emerge

By the end of the decade, defenders of the administrative state began to sketch a different defense: agencies were locations in which democratic politics could occur.

In 1941, Walter Gellhorn described three “great phases” of the judicial confrontation with the administrative state. In the first, at the end of the nineteenth century, “alarmed lawyers turned to judges who were equally alarmed to save what they could from the ravaging administrators.”⁸² This “begot the impulse to extend and extend judicial review of administration determinations.”⁸³ In the second phase, “the burning question was whether and how much a court

79. JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 312 (1927).

80. *Id.*

81. *Id.* at 315.

82. WALTER GELLHORN, *FEDERAL ADMINISTRATIVE PROCEEDINGS* 42 (1941).

83. *Id.*

could review (and, in reviewing, revise) administrative judgments.”⁸⁴ Judicial review alone was ineffective, though, partly because judges “were sometimes less than supermen and were therefore themselves capable of erring,”⁸⁵ and partly because judges could not “reach more than a tiny segment of the administrative output.”⁸⁶ The second phase, Progressive commentators agreed, resulted in a tempering of the judicial impulse to extend judicial review.⁸⁷

The third phase, according to Gellhorn, “addressed . . . the procedure of administration itself.”⁸⁸ For James Landis, “The positive reason for declining judicial review over administrative findings of fact is the belief that the expertness of the administrative, if guarded by adequate procedures, can be trusted to determine these issues as capably as judges.”⁸⁹ Gellhorn, too, was skeptical about “push[ing] beyond the antechamber into the atmosphere of the courtroom.”⁹⁰ Administrators should not “slavishly emulate judicial models.”⁹¹ Agencies had developed adjudicatory techniques that were “surely the equal of and very probably superior to the more orthodox processes.”⁹² Agencies administering social welfare benefits, for example, were able to gather information “quick[ly] and inexpensive[ly].”⁹³ Their hearings had “no adversary positions, no cross-examination, no witness chairs. The claimant [told] his story as he please[d]; sources outside the ‘hearing’ [were] freely admitted.”⁹⁴

Sharfman’s summary of the ICC’s approach to procedure emphasized the Commission’s “flexible adjustment of its practices to

84. *Id.*

85. *Id.*

86. *Id.* at 43.

87. To quote Sharfman, “Through a self-denying interpretation of their own functions in the prevailing scheme of control . . . the courts have progressively narrowed the scope of judicial review.” 1 SHARFMAN, *supra* note 16, at 7; *see also* 2 *id.* at 347 (“For more than two decades . . . the occasions and grounds of judicial review have been progressively narrowed This result has been largely accomplished by the courts themselves”); 2 *id.* at 385 (“[T]he courts have adopted a dominantly self-denying attitude in matters of review. . . . [T]here is a broad and significant zone in which the Commission’s determinations are clothed with finality [This] was not characteristic of the Commission’s status during the first two decades of its existence.”).

88. GELLHORN, *supra* note 82, at 43.

89. LANDIS, *supra* note 6, at 142.

90. GELLHORN, *supra* note 82, at 60–61.

91. *Id.*

92. *Id.* at 68.

93. *Id.*

94. *Id.*

meet distinctive needs,”⁹⁵ and, referring to the Commission’s treatment of evidentiary questions, concluded that “the Commission has proceeded in the spirit of the determinations of the courts, infringing upon when necessary, rather than disregarding as a matter of principle, the established standards.”⁹⁶ For Sharfman, “Not only is the administrative method . . . indispensable to sound and realistic adjustment of complex relationships in the public interest, but through the employment of quasi-judicial methods it has flexibly but successfully safeguarded all essential private rights.”⁹⁷

Sharfman’s reference to “infringements” of judicial standards for the admissibility of evidence was telling. His claim that the Commission did not reject the judicial model “as a matter of principle” was undermined by his celebration of the Commission’s procedural flexibility.⁹⁸ Perhaps the Commission did not reject the judicial model as a matter of principle, but it clearly—and to Sharfman appropriately—was not committed to that model as a matter of principle from which departures should be made grudgingly. Sometimes the Commission’s choice of quasi-judicial procedures converged with the judicial model, not because of principle but from a contingent evaluation of what the Commission, not the courts, regarded as a proper accommodation of the public interest and the demands of fairness. In 1941, Gellhorn offered the comforting suggestion that “[t]he gap between administrative and judicial practice is fast narrowing”⁹⁹ because of transformations in the courts’ approach to procedure—arguably, a vindication of the agencies’ insistence on procedural flexibility.¹⁰⁰

The Progressives’ theory of administrative procedure in the 1930s remained what it had been from the outset. In principle, they believed, agencies should have complete discretion to choose the procedures determined by experts in the field to be suitable to the particular problems facing each agency.¹⁰¹ Robert Cooper, a special

95. 4 SHARFMAN, *supra* note 16, at 244 (1937).

96. *Id.* at 212.

97. *Id.* at 255–56 (footnote omitted).

98. *See supra* notes 95–97 and accompanying text.

99. GELLHORN, *supra* note 82, at 79.

100. *See id.* at 78–79 (“Today’s clamorous accusations that administrative agencies flout the laws of evidence will . . . soon subside. The courts themselves are destroying rigidity in the rules, leaving them flexible enough to meet varied needs.”).

101. *See, e.g.,* Cooper, *supra* note 36, at 600 (“If modern government is to assume its proper responsibility in solving the fundamental and perplexing problems of the day with intelligence

assistant to Attorney General Homer Cummings, offered a particularly forceful statement in 1938: those who supported what he called “the doctrine of judicial infallibility” were

presumably of the opinion that an independent tribunal endowed with the antiquated or cumbersome methods of legal procedure, steeped in the traditions of the common law and completely isolated from the previous steps in the administrative process, is the most suitable agency to determine finally the existence of certain basic facts pertaining to an administrative controversy.¹⁰²

Circumstances would sometimes force agencies to depart from this principle, but those departures were extraneous impositions on agencies.¹⁰³

Yet looming over all this was the specter of an administrative state completely divorced from democratic control.¹⁰⁴ By the early 1930s, Soviet Russia and fascist Italy had replaced bureaucratic France as the image of the administrative state degenerating into tyranny, to be joined in the next few years by Nazi Germany. Defending “democracy [as] the reign of reason on the most extensive scale,”¹⁰⁵ Frankfurter observed in 1930 that “[s]ensational and violent rule in Russia and Italy throws out of perspective more plodding popular institutions.”¹⁰⁶ How, though, were those plodding institutions to be truly popular if they were staffed by professionals and experts? Toward the end of the 1930s, Progressive theorists found themselves pressed to defend the democratic legitimacy of administrative agencies more vigorously than they had at the decade’s outset. Sometimes they sounded older themes, but the more perceptive of them began to develop the idea that agency processes themselves could be a form of democratic participation in decisionmaking.

To some extent, the Progressive theorists of the administrative state simply asserted that the norms of the experts’ professions were

and foresight, administration must first be accorded a status of autonomy with the functional structure of the State.”).

102. *Id.* at 595.

103. *See id.* at 601–02 (“If the concept of an autonomous system of administration is generally considered to be irreconcilable with the indispensable safeguards against unlawful administrative action by reference to the assumption of judicial superiority, popular government will inevitably give way to a more efficient form of political authority.”).

104. For a discussion of Albert Venn Dicey’s criticisms of the inherent lack of democratic accountability in administrative regimes, see *infra* notes 119–20 and accompanying text.

105. FRANKFURTER, *supra* note 4, at 127.

106. *Id.* at 123.

enough to give popular sanction to the technical exercises in which the professionals were engaged.¹⁰⁷ Frankfurter acknowledged that “agitation and advocacy have their place” as “instruments of education.”¹⁰⁸ But, he continued, “the quiet, detached, laborious task of disentangling facts from fiction, of extracting reliable information from interested parties, of agreeing on what is proof and what surmise, must precede, if agitation is to feed on knowledge and reality.”¹⁰⁹

Professionalism alone, then, was insufficient to give the actions of administrative agencies the popular warrant they required. Gellhorn argued in 1941 that the very procedures designed to ensure fairness to the subjects of regulation also “democratize[d] our governmental processes,” because they “[brought] to the interests and individuals immediately affected an opportunity to shape the course of regulation, modeling it to fit the contours of their own special problems.”¹¹⁰ “Officials in constantly increasing numbers,” he continued, were “perceiving the significant mutuality of gain flowing from private participation in the administrative process.”¹¹¹ That perception led them to “improve the tools”—the procedures they used—for “securing” that participation.¹¹² Gellhorn understood that this raised “certain possibilities of excess” when “official mechanisms [came] wholly under the control of outside pressures.”¹¹³ But he did not see “any element of impropriety in this development,”¹¹⁴ because it was “the almost inevitable concomitant of concentration upon a somewhat homogeneous area of control.”¹¹⁵ For Gellhorn, “A real picture of government regulation of an industry would not always show two scowling antagonists, but rather more often two smiling collaborators.”¹¹⁶ Without any apparent irony intended, Gellhorn wrote that this was “a very pleasant prospect, indeed, and one which

107. See, e.g., LANDIS, *supra* note 6, at 98–99 (arguing that because agencies “move[] in a narrow field,” a “professionalism of spirit” will constrain the administrative state and assure “informed and balanced judgments”).

108. FRANKFURTER, *supra* note 4, at 153.

109. *Id.*

110. GELLHORN, *supra* note 82, at 122.

111. *Id.*

112. *Id.*

113. *Id.* at 131.

114. *Id.*

115. *Id.* at 131–32.

116. *Id.* at 132.

one would not care to alter—so long as the administrative agency maintains a residual distinction between governmental regulation and industrial self-regulation.”¹¹⁷ After all, “the unorganized public interest is represented by the agency and . . . there is today no effective substitute for that type of representation.”¹¹⁸

E. Summary

By the end of the 1930s, the Progressive theory of administrative law had begun to take on a new shape. Progressives still sought to free agencies from close judicial supervision. They pressed the courts to characterize issues as involving facts—the agencies’ proper domain—rather than law, the domain of the courts. Experience had shown, though, that agencies were deeply implicated in politics and that expertise offered no escape. Incorporating politics into the theory of administrative law remained a challenge for Progressives. They started to meet that challenge as they considered what the Supreme Court had done with administrative law during the decade.

II. THE COURTS’ ROLE IN ADMINISTRATIVE LAW

The Supreme Court weighed in on administrative law in a series of cases during the 1930s, both before and after New Deal legislation created an efflorescence of new agencies such as the SEC, the NLRB, and others. As the 1930s proceeded—both before and after the New Deal—constitutional and administrative law moved, more haltingly than Frankfurter and other Progressives hoped but further than they acknowledged, toward the Progressive ideal. Frankfurter and other Progressives, including dissenting Justices, saw the Court’s decisions as a mix of persistent resistance to the modes of governance required by modern society with grudging but quite modest accommodation of traditional doctrine to new problems. Yet the Progressive agenda for administrative law was, in essence, to liberate agencies from judicial supervision so that technocracy guided loosely by politics could replace law. Nothing the Court could do other than withdraw completely from the field would have comported with that agenda.

117. *Id.*

118. *Id.* Again, fascist Italy was the counterimage: agencies had to be objective and not partisan because “Italian corporativism” was the “logical extension of the partisan-principle,” hardly a “democratization of administration.” *Id.* at 144.

The Hughes Court's decisions transformed administrative law without going that far. They greatly expanded the boundaries within which administrative agencies could operate free of significant judicial supervision, although the true breadth of the Hughes Court's concessions to those agencies would not be apparent until the 1940s, after Hughes had passed from the scene. As in much of the Hughes Court's work, the Court here moved into the terrain Roosevelt's appointees hoped the Court would occupy, but left them unsure about the Court's exact position. Still, the Progressive critique of traditional doctrines of administrative law gave them clear ideas about how to move forward.

A. Background: Administrative Law to 1930

Writing in 1885 and concerned about the incipient displacement of the common law by administrative law, British jurist Albert Venn Dicey asserted that the first requirement of the rule of law was that "no man . . . can be lawfully made to suffer . . . except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land."¹¹⁹ Dicey's target was the French system of *droit administratif*, which he expressly described as a system of unbridled discretion.¹²⁰ When his work traveled across the Atlantic, few proponents of new administrative agencies had anything like that in mind. Yet the translation was too obvious to avoid, and Dicey's dictum became an important component of the conservative resistance to the development of a distinctive administrative law in the United States.

Progressive defenders of the modern administrative state could not accept Dicey's conception of the rule of law. The whole point of modern administrative law, in their view, was to supplant the cumbersome procedures of the "ordinary courts" with agencies that could rely on their expertise to dispense with some of those procedures, more deftly responding to rapid social and economic change, and more efficiently handling cases in large numbers. As the Progressives increasingly theorized their commitments, they came close to endorsing the proposition that administrative agencies ought

119. ALBERT VENN DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 175 (3d ed. 1889).

120. See *id.* at 307 (arguing that under a system of *droit administratif* "[a]ll dealings . . . in which the rights of an individual in reference to the state or officials representing the state come in question, fall within the scope of administrative law").

to exercise unbridled discretion. Reality could not match their theories, of course, and by the 1920s Progressives and conservatives had reached an accommodation of sorts.

Progressives continued to resist Dicey's view in principle. When they could, they disdained the use of the procedures of ordinary courts. Juvenile courts, for example, ran on principles that departed significantly from those used down the hall in criminal courts.¹²¹ Elsewhere, though, powerful opponents forced Progressives to compromise their principles. As Henderson's work showed, economic regulatory agencies in particular adopted procedures strongly resembling those of ordinary courts.¹²² Progressives understood that agency hearings—whether to enforce regulations or to develop investigative reports—had to ensure some degree of fairness, and lawyers heading the agencies and serving on their staffs naturally took the procedures of the ordinary courts as the starting point. Still, principle demanded that agencies not be required to mirror the courts exactly.

Representatives of the business community compromised as well. The leading thinkers among them appreciated some of the advantages of independent agencies. Experts might be more responsive to their concerns than legislatures that could fall under the sway of populist political forces. As Elihu Root put it at New York's constitutional convention in 1913, legislators offered "a multitude of strike bills introduced for the purpose of holding up the corporations, holding them up and calling them down," to which corporations responded by getting involved—and, as Root put it, creating "a scandal and a disgrace"—in politics.¹²³ Agency proceedings might move more quickly to an acceptable conclusion than judicial ones. Coming to terms with regulatory agencies meant accepting some departures from the procedures used in the ordinary courts, but not departures that were too substantial. Hewing closely to ordinary courts' procedures had the added advantage of giving the lawyers

121. For an overview of the early history of juvenile courts and its connection to Progressivism, see generally VICTORIA GETIS, *THE JUVENILE COURTS & THE PROGRESSIVES* (2000).

122. See HENDERSON, *supra* note 26, at 49–103 (outlining and analyzing the FTC's adjudication procedures).

123. 3 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 3102 (1916). "Strike bills" were bills aimed at placing corporations under economic pressure in the way that labor strikes did. I thank Dan Ernst for this reference.

who represented businesses in court the opportunity to extend their representation to administrative agencies.¹²⁴

By the 1920s the law regarding administrative procedures had stabilized. Although there was no “general” administrative law, but merely statutes dealing with individual agencies or a general law dealing with judicial review of executive action, lawyers understood the patterns that had emerged. Administrative agencies could indeed depart from traditional judicial procedures, and across a rather wide range of matters courts would accept their decisions.¹²⁵ In 1934, Justice Cardozo wrote for a unanimous Court reversing a lower court decision that had overturned an FTC ruling.¹²⁶ Citing the statutory provision that the FTC’s factual findings, “if supported by testimony, shall be conclusive,” the Court chastised the lower court for giving this provision “lip service only” by “picking and choosing for itself among uncertain and conflicting inferences.”¹²⁷ The reviewing court should not become “an administrative body which is to try the case anew.”¹²⁸ This was, as Cardozo observed, well-established law.¹²⁹ The Supreme Court occasionally asserted that administrative decisions were presumed to be correct, although of course such a presumption was inevitably flexible.¹³⁰ The open questions involved determining the limits of departures from the conclusiveness of agency decisions.

The proliferation of agencies in the New Deal placed this accommodation under substantial pressure. In part the pressure arose from the fact that some aspects of agency decisionmaking did not involve anything that could have been classified as scientific expertise in traditional terms and, concomitantly, that some aspects of agency decisionmaking were political in a straightforward sense. William

124. See, e.g., Robert W. Gordon, “*The Ideal and the Actual in the Law*”: *Fantasies and Practices of New York City Lawyers, 1870–1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 52, 64–65 (Gerard W. Gawalt ed., 1984) (arguing that a segment of the New York corporate bar expressly adopted a “corporatist” position within which this sort of representation fit comfortably).

125. See, e.g., *Tulsidas v. Insular Collector of Customs*, 262 U.S. 258, 265 (1923) (reasoning that deference to adjudications by customs officials “will leave the administration of the law where the law intends it should be left; to the attention of officers made alert to attempts at evasion of it and instructed by experience”).

126. *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 82 (1934).

127. *Id.* at 73.

128. *Id.* at 77.

129. *Id.*

130. See, e.g., *FTC v. Pac. States Paper Trade Ass’n*, 273 U.S. 52, 63 (1927) (“The weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the commission.”).

Leiserson, appointed to the NLRB in 1939, was an experienced arbitrator and mediator¹³¹ who surely believed that there was indeed a science to resolving disputes between labor and management.¹³² But the NLRB as a whole was a politicized body whose claims to expertise were regularly belied by its decisions and by the evident partiality of its staff, including the lawyers.¹³³ The ICC, the object of Sharfman's and Frankfurter's admiration,¹³⁴ may have set the gold standard for administrative agencies. Elite lawyers, including a majority on the Supreme Court, understood that not every agency measured up to that standard. Progressive claims about the inherent fairness of decisions made by independent and expert agencies rang hollow, or at least hollow enough to threaten to undo the accommodations reached in prior decades. The Hughes Court struggled to develop an administrative law that itself accommodated the varied performance of the agencies it supervised.

B. The Supreme Court Weighs In: The St. Joseph Stock Yards Case

The first major dustup over the New Deal approach to administrative law occurred in 1936, concurrent with what New Dealers saw as the Court's attack on the New Deal itself. The case, *St. Joseph Stock Yards Co. v. United States*,¹³⁵ involved an ordinary ratemaking proceeding, and the issue before the Supreme Court was the scope of judicial review of agency factfinding.¹³⁶ Stockyards were a crucial stop in meat's journey from ranch to table.¹³⁷ Cattlemen and other ranchers shipped their stock by train to the stockyards.¹³⁸ There, "commission men" hired by the stockyard unloaded the stock from the trains and drove the animals to pens, where they provided the animals with food and water until the animals were sold.¹³⁹ Stockyards charged fees for these services. Indeed, because each city had no

131. EARL LATHAM, *THE COMMUNIST CONTROVERSY IN WASHINGTON: FROM THE NEW DEAL TO MCCARTHY* 140–41 (1966); see also *National Affairs: Two Nice Men*, TIME, May 8, 1939, available at <http://www.time.com/time/magazine/article/0,9171,761206,00.html>.

132. LATHAM, *supra* note 131, at 140–41.

133. For a discussion of investigations of Communist Party influence within the NLRB, see *id.* at 124–50.

134. FRANKFURTER, *supra* note 4, at 25; 3B SHARFMAN, *supra* note 16, at 755 (1936).

135. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1935).

136. *Id.* at 45.

137. See *Stafford v. Wallace*, 258 U.S. 495, 515–16 (1922) (detailing the importance of stockyards as "necessary factors in . . . this current of commerce").

138. *St. Joseph Stock Yards*, 298 U.S. at 56–57.

139. *Id.*

more than a few stockyards,¹⁴⁰ the commission men were able to charge monopoly prices for their services.¹⁴¹

Responding to pressure from ranchers and shippers, Congress in 1921 enacted the Packers and Stockyards Act.¹⁴² Using language drawn from the statute authorizing the ICC to set railroad rates, the Act gave the Secretary of Agriculture the power to set maximum rates for the services stockyards provided.¹⁴³ Within the department, the Secretary assigned the task of rate-setting to the Bureau of Animal Industry, headed by a well-published veterinarian, John R. Mohler, who led the Bureau from 1917 to 1943.¹⁴⁴ According to testimony given to a 1940 inquiry into how agencies actually operated, the Bureau had a “live-and-let-live policy” toward the commission men and generally acceded to their claims about the level of rates needed to ensure profitability.¹⁴⁵

In 1929 R.W. Dunlap, the Acting Secretary pending the confirmation of a permanent cabinet member, opened an inquiry into the charges at the stockyard in St. Joseph, Missouri, which serviced cattle and other animals for the Swift and Armour meatpacking companies.¹⁴⁶ By February 1931, Arthur Hyde—confirmed as Secretary of Agriculture shortly after Dunlap’s initial action—had not reached a decision, and the stockyard operator petitioned to reopen the hearing to take account of the changed circumstances occasioned by the Great Depression. The Secretary denied the petition and, in July 1931, lowered the rates previously charged by the stockyard. The stockyard sued to bar the Secretary from enforcing the rate order, arguing that he should have reopened the hearing. The three-judge district court to which the case was assigned agreed. Hyde then

140. See *Stafford*, 258 U.S. at 514–15 (noting the problems of monopoly that animated passage of the laws regulating stockyards).

141. *St. Joseph Stock Yards*, 298 U.S. at 68–69.

142. Packers and Stockyards Act, 1921, ch. 64, 42 Stat. 159 (codified as amended at 7 U.S.C. §§ 181–229c (2006)); see also *Stafford*, 258 U.S. at 513–16 (describing the conditions that led to the enactment of the Packers and Stockyards Act).

143. *Stafford*, 258 U.S. at 514 (noting that the Packers and Stockyards Act allows the Secretary of Agriculture to “make rules and regulations to carry out the provisions, to fix rates, or a minimum or maximum thereof”).

144. Daniel R. Ernst, *Morgan and the New Dealers*, 20 J. POL’Y HIST. 448, 450 (2008).

145. *Id.* (quoting *Transcript of Proceedings Before the Att’y Gen.’s Comm. on Admin. Procedure* 87 (June 28, 1940) (testimony of Thomas Cooke) (on file with the *Duke Law Journal*)).

146. Transcript of Record at 2, *St. Joseph Stock Yards*, 298 U.S. 38 (No. 497).

conducted a new hearing starting in 1932.¹⁴⁷ As a result of that hearing, Rexford Tugwell, the Acting Secretary of Agriculture, entered a new rate order in January 1934.¹⁴⁸ In February, Henry Wallace, the new Secretary of Agriculture, heard the stockyard's argument against the rates, but in May he confirmed the order. His findings occupied more than one hundred pages in the record submitted to the Supreme Court.¹⁴⁹ Wallace ordered that the stockyard lower some of its rates—ones he found unreasonable and discriminatory—while freezing others at their existing levels.¹⁵⁰ He allowed the stockyard to charge sixty cents above the market price for hay,¹⁵¹ for example, rather than the sixty-five to seventy cents the stockyard had been charging.¹⁵² Wallace's decision may have been motivated by his populist discomfort with agricultural middlemen, but the Hoover administration's agency had also pushed for a reduction in the commission men's rates.¹⁵³

After Wallace ordered the new, lower rates, the stockyard operator again petitioned to reopen the hearing, this time citing the changes the National Industrial Recovery Act and the Agricultural Adjustment Act were about to bring to the industry.¹⁵⁴ Wallace denied the petition, and the stockyard again sought an injunction from the district court.¹⁵⁵ The company asserted that Wallace should have reopened the hearing and that the rates he had set were unconstitutionally confiscatory.¹⁵⁶

After a defeat in the district court, the stockyard appealed the Secretary's order to the Supreme Court. The company insisted that the Secretary had misvalued many of the company's assets—for example, its land and a commercial hotel used by shippers and truck drivers—and, as a result, had set the rates too low to generate the ordinary rate of return that the Constitution required. The district court had lamented that “heavily burdened courts [were] compelled

147. *Id.*

148. *Id.* at 5.

149. *Id.*

150. *Id.* at 6.

151. *Id.* Ex. A, at 128.

152. *Id.* Ex. A, at 42.

153. For these details, see *id.* Ex. A, at 24–131.

154. *Id.* at 21; *id.* Ex. A, at 26–27.

155. *Id.* at 1, 5.

156. *Id.* at 15.

to examine every separate matter.”¹⁵⁷ That lament was supported by the massive record in the case and, even more, by the briefs filed in the company’s appeal. The abstract of the record ran to 1,648 printed pages, with 1,358 additional pages of exhibits, maps, photographs, and what Justice Brandeis later referred to as “reading matter.”¹⁵⁸ The company’s brief ran to 185 pages, with a separate appendix “prepared in order that the brief itself may be kept within reasonable limits.”¹⁵⁹ The government’s brief, too, had an appendix, albeit a short one. But the substantive brief ended on page 205.¹⁶⁰

The briefs’ bulk resulted from their canvassing of each challenged finding of fact. Both sides saw the “scope of review” question as key. The government did its best to minimize the issue, although it preferred a standard under which the courts would uphold agency findings of fact supported by “some evidence.”¹⁶¹ The summary of its argument said, “In view of the fact that the record fully sustains the Secretary’s order on any theory of judicial review, the question of the scope of judicial review is not material in this case.”¹⁶² Only after almost two hundred pages devoted to the valuation issues did the brief return to the scope-of-review issue.¹⁶³

The stockyard’s brief, in contrast, put the issue first and treated it as dispositive. The discussion opened with an unannotated list of nineteen cases that it asserted supported the view that courts should exercise “independent judgment” about what the record established.¹⁶⁴ Then, analyzing the district court’s opinion, the brief said that that court had gone “no further than to ascertain whether there was some evidence to sustain the Secretary” and “did not even weigh the evidence . . . to decide whether the Secretary’s evidence sustained the conclusions stated.”¹⁶⁵ The brief then quoted snippets

157. *St. Joseph Stock Yards Co. v. United States*, 11 F. Supp. 322, 328 (W.D. Mo. 1935).

158. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 86 (1935) (Brandeis, J., concurring).

159. Brief for Appellant at 2, *St. Joseph Stock Yards*, 298 U.S. 38 (No. 497).

160. Brief for the United States and the Secretary of Agriculture at 205, *St. Joseph Stock Yards*, 298 U.S. 38 (No. 497).

161. *Id.* at 199–204.

162. *Id.* at 16.

163. *See id.* at 199 (beginning the government’s discussion of the scope-of-review issue).

164. Brief for Appellant, *supra* note 159, at 10–11, 14.

165. *Id.* at 14 (emphasis omitted).

from each of the nineteen cases, an “unbroken line” adopting the independent-judgment rule.¹⁶⁶

Justices Stone and Cardozo observed that the independent-judgment rule was fully supported by precedents that they believed were mistaken.¹⁶⁷ They would have “acquiesce[d]” in an opinion that simply applied those precedents.¹⁶⁸ But, they thought, Chief Justice Hughes’s opinion for the Court tried to do more: “[t]he opinion reexamines the foundations of the rule that it declares, and finds them to be firm and true.”¹⁶⁹ And indeed it did, but perhaps because Hughes believed that the government was contending for an extremely restrictive scope for judicial review of agency findings of facts bearing on constitutional questions. The government’s proposed test used language concerning compulsion.¹⁷⁰ This suggested that the government’s test was more like “some evidence to support the agency’s findings” rather than “substantial evidence.” Hughes’s opinion for the Court rehearsed the arguments for the independent-judgment test without framing the contrary position in terms of “substantial evidence.”¹⁷¹

For Hughes, the scope-of-review issue was directly connected to the Constitution’s supremacy. Sounding a realistic note, he observed that “agencies . . . work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient.”¹⁷² Making agency findings “conclusive where constitutional rights of liberty and property are involved . . . is to place those rights at the mercy of administrative officials.”¹⁷³ For Hughes, “That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded.”¹⁷⁴ Although Hughes did not spell it out, the connection

166. *Id.* at 18–22.

167. *See* *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 93 (1936) (Stone & Cardozo, JJ., concurring) (“We think the opinion of Mr. Justice Brandeis states the law as it ought to be, though we appreciate the weight of precedent that has now accumulated against it.”).

168. *Id.*

169. *Id.*

170. *See* Brief for the United States and the Secretary of Agriculture, *supra* note 160, at 200–01 (“[C]onstitutional rights are adequately protected if the reviewing court examines the evidence for itself and determines that it does not compel arrival at different conclusions of fact than those reached by the rate-making authority.”).

171. *St. Joseph Stock Yards*, 298 U.S. at 50–54.

172. *Id.* at 52.

173. *Id.*

174. *Id.*

between these concerns and his references to “political demands” and “subservient” agencies is clear: independent judgment on facts bearing on constitutional rights was necessary to guard against the possibility that a subservient agency would twist its factual findings in response to political demands.

Yet this did not mean that courts should simply disregard what the agency had done. The courts’ task “may be greatly facilitated” and “informed and aided by the sifting procedure of an expert legislative agency.”¹⁷⁵ The courts were to look at the record as a whole, there was a “strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing,”¹⁷⁶ and the regulated entity had to make “a convincing showing” that rates were so low as to amount to confiscation.¹⁷⁷ Summarizing, Hughes wrote that “findings made by a legislative agency after [a] hearing will not be disturbed save as in particular instances they are plainly shown to be overborne.”¹⁷⁸

After reaffirming the independent-judgment test with all the qualifications, Hughes’s opinion turned to the valuation questions and systematically affirmed the district court’s decisions on each one.¹⁷⁹ The discussion occupied nearly twenty pages in the U.S. Reports, compared to the six devoted to the scope-of-review question. The result was to uphold the district court’s decision that the new rates did not violate the Constitution.¹⁸⁰

Justice Brandeis agreed with that outcome—as did Justices Stone and Cardozo—but rejected the independent-judgment rule in favor of a “substantial evidence” test.¹⁸¹ All that the Constitution required, according to Brandeis, was a fair hearing before an impartial tribunal that reached a conclusion supported by the evidence; it did not require an inquiry “into the correctness of . . . findings of subsidiary facts.”¹⁸² Citing *Ng Fung Ho v. White*,¹⁸³ his own decision on de novo review of the question of citizenship, Brandeis distinguished between

175. *Id.* at 53.

176. *Id.* (quoting *Darnell v. Edwards*, 244 U.S. 564, 569 (1917)).

177. *Id.*

178. *Id.* at 54.

179. *Id.* at 55–72.

180. *Id.* at 72.

181. *Id.* at 73 (Brandeis, J., concurring) (“I think no good reason exists for making special exception of issues of fact bearing upon a constitutional right.”).

182. *Id.* at 73–74.

183. *Ng Fung Ho v. White*, 259 U.S. 276 (1922).

“the right to liberty of person and other constitutional rights.”¹⁸⁴ Courts had to determine facts implicating the former, but Brandeis devoted several pages to describing “a multitude of decisions [that] tells us that when dealing with property a much more liberal rule applies.”¹⁸⁵

Brandeis catalogued the grounds on which decisions could be overturned on the basis of inadequate evidence. The formulations ranged from a “lack of findings necessary to support” the decision to a decision’s being “made without evidence.”¹⁸⁶ Brandeis offered another formulation: “whether there was evidence upon which reasonable men could have found as the Secretary did.”¹⁸⁷ These standards resonated with the quite loose “no evidence” standard that Hughes seemed to find in the government’s position. No “rigid rule” governed; rather, the Court “ha[d] followed the rule of reason” and “ha[d] weighed the relative value of constitutional rights, the essentials of powers conferred, and the need of protecting both.”¹⁸⁸ Brandeis had to face up to seemingly adverse precedents, but in the end he reverted to fundamentals. “The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly.”¹⁸⁹

Writing in the *Yale Law Journal* in 1938, Ralph Fuchs saw in *St. Joseph Stock Yards* a “quite clear[] . . . distrust of administrative agencies and a belief in the superiority of the courts,”¹⁹⁰ and he connected that decision to the Diceyan tradition.¹⁹¹ Echoing Brandeis’s observation that the Supreme Court “has recognized that there is a limit to the capacity of judges, and [that] the magnitude of the task imposed upon them . . . may prevent prompt and faithful performance,”¹⁹² Robert Cooper in the same issue described *Crowell v. Benson*¹⁹³ as resting on a “presumption of judicial infallibility”

184. *St. Joseph Stock Yards*, 298 U.S. at 77 (Brandeis, J., concurring) (citing *Ng Fung Ho*, 259 U.S. at 282–85).

185. *Id.* at 77–82.

186. *Id.* at 74.

187. *Id.* at 83.

188. *Id.* at 81–82.

189. *Id.* at 84.

190. Fuchs, *supra* note 36, at 565.

191. *Id.* at 557–59.

192. *St. Joseph Stock Yards*, 298 U.S. at 81 (Brandeis, J., concurring).

193. *Crowell v. Benson*, 285 U.S. 22 (1932).

about finding “facts in the absolute.”¹⁹⁴ These were clear overstatements. The practical distance between Hughes’s position and Brandeis’s was quite small, although the ideological and methodological distance may have been larger.¹⁹⁵

Hughes rejected the most extreme position he thought the government might be taking: that agency findings of fact had to be accepted by the courts if those findings were supported by any evidence at all.¹⁹⁶ In form, he rejected the proposition that such findings had to be accepted if they were supported by substantial evidence. Yet he followed his rejection of that proposition with statement after statement indicating that courts would be well advised to give substantial weight to the agencies’ findings.¹⁹⁷ And, notably, the entire controversy involved only findings of fact bearing on the question of whether the agency action violated the Constitution. That the substantial-evidence test applied to other agency findings was accepted by all.¹⁹⁸

Hughes’s analysis in *St. Joseph Stock Yards* looked backward to a legal world in which, as Brandeis put it, “rigid rules” governed in an on-or-off fashion: independent judgment on facts bearing on constitutional violations, some evidence for other facts.¹⁹⁹ Brandeis’s was a typically nonformalist, legal-realist approach in which interests were to be balanced. But Hughes’s opinion had its realistic elements as well. Even the Progressive theorists of administrative law understood that what Hughes described as the “multiplication of administrative agencies” undermined the Progressive claim that all agencies were equally expert.²⁰⁰ Brandeis envisioned a world in which administrative agencies were professional and expert, and relied on a

194. Cooper, *supra* note 36, at 593–94.

195. Brandeis was disturbed that rates the Secretary had determined to be excessive had been in effect for more than six years after Dunlap began the inquiry and for more than two years after Wallace’s decision, and Brandeis cited a number of other cases in which review of ratemaking had taken years. *St. Joseph Stock Yards*, 298 U.S. at 88–92 (Brandeis, J., concurring). After the Court’s clarification of the proper standard of review, though, delays could be expected to diminish.

196. *Id.* at 50–53 (majority opinion).

197. *Id.*

198. *Id.* at 51; *id.* at 73 (Brandeis, J., concurring); *id.* at 93–94 (Stone & Cardozo, JJ., concurring); see also *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 230 (1938) (holding the National Labor Relations Act’s directive that NLRB findings were conclusive “if supported by evidence” to require “such relevant evidence as a reasonable mind might adopt as adequate to support a conclusion”).

199. *St. Joseph Stock Yards*, 298 U.S. at 50–53.

200. *Id.* at 52.

seemingly infallible judiciary to take variations in expertise and ability into account when balancing interests. Hughes explicitly recognized imperfections in agencies, and his formalism implicitly recognized the difficulty imperfect judges would have in accurately determining which agencies deserved greater deference, which less. Imperfect courts exercising independent judgment in all cases might produce a better accommodation of competing interests than imperfect courts attempting to balance the interests directly.

Under Hughes's approach, the courts nominally exercised independent judgment. Giving "weight" to an agency's findings is not the same as treating those findings as conclusive if supported by substantial evidence, but the difference is not large. Cooper thought that the "mental gymnastics" required by Hughes's formulations were "beyond the capacity of even the greatest human intellect."²⁰¹ If so, the decision would be a victory in practice for the Progressive conception of administrative law: agency actions would be routinely upheld because courts could not perform the "mental gymnastics" required to distinguish between constitutional and ordinary facts and between "some evidence" and "substantial evidence." For Hughes, though, leaving the decision in the courts' hands—no matter how little that might matter in any case—preserved what was left of the Diceyan tradition in U.S. administrative law. Once again, Hughes looked backward and forward at the same time.

C. *The SEC as a "Star Chamber"?*

A week after the oral arguments in *St. Joseph Stock Yards*, the Court heard J. Edward Jones's challenge to efforts by the SEC to investigate his practices as a dealer in oil royalties. Jones was the flamboyant chair of the National Petroleum Council, which purported to represent independent oil producers, and a fervent opponent of government regulation of his business practices.²⁰² He offered his clients rights to participate in the distribution of royalties from oil fields; the SEC believed that he inflated the likely returns from the royalties and sometimes used earnings from other securities to pay off the oil royalties in something like a Ponzi scheme. The record in *Jones v. SEC*²⁰³ was thinner than that in *St. Joseph Stock Yards*, and Justice Sutherland was able to produce an opinion more quickly than

201. Cooper, *supra* note 36, at 598.

202. *SEC Seeks Writ Against J.E. Jones*, N.Y. TIMES, Feb. 5, 1935, at 36.

203. *Jones v. SEC*, 298 U.S. 1 (1936).

Hughes. Announced on April 6, 1936—after the Supreme Court had struck down the Agricultural Adjustment Act in January²⁰⁴ and heard arguments regarding the Bituminous Coal Conservation Act in March²⁰⁵—the decision in *Jones* avoided deciding whether Congress had the power to regulate the issuance of securities and found instead that the Commission's procedures had violated Jones's rights.²⁰⁶ Sutherland's opinion contributed to the inflamed atmosphere surrounding the Court in 1936.²⁰⁷

Throughout 1935, lawsuits were buzzing around Jones's head.²⁰⁸ The reason, he said, was that Harold Ickes, who as Secretary of the Interior supervised oil production, was out to get him because of Jones's adamant opposition to what he called Ickes's attempt to give "dictatorship powers to him[self] for the absolute control of the petroleum industry."²⁰⁹ Jones saw himself as the representative of the small, ruggedly individualistic, independent oil producers standing up against major oil companies' efforts to mobilize the government to crush them under the guise of eliminating sharp business practices and overproduction.²¹⁰ Jones quoted an unnamed source who had told him that Ickes wanted the SEC "to 'turn on the heat' in my personal direction," and that Ickes had said, "I will put J. Edward Jones in cold

204. Agricultural Adjustment Act, ch. 25, 48 Stat. 31 (1933), *invalidated by* United States v. Butler, 297 U.S. 1 (1936).

205. Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991, *invalidated by* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

206. *Jones*, 298 U.S. at 21–22.

207. See *infra* text accompanying notes 268–75.

208. The oddest lawsuit was a criminal prosecution brought by the federal government against William Rabell, who had been employed as an accountant and investigator for the SEC. The government charged Rabell with soliciting a bribe from Jones. *Jones Bribe Case Called Plot on SEC*, N.Y. TIMES, Oct. 1, 1935, at 3. Jones testified that Rabell came to his house in Scarsdale, New York, in June 1935 and offered to testify favorably to Jones at an SEC hearing in exchange for \$27,500, of which, the government said, he received \$250. *Rabell Bribe Case Dismissed by Judge*, N.Y. TIMES, Jan. 23, 1936, at 10. Jones was cooperating with the local U.S. Attorney's office in an effort, Rabell's lawyer argued, to "ruin" the SEC, and, again according to Rabell's lawyer, Jones's attorney "had acted as 'stage manager'" for the prosecutors, who had planted recording devices at Jones's house. *Jones Bribe Case Called Plot on SEC*, *supra*. The episode was bizarre enough that the first jury to hear the case could not arrive at a verdict. After testimony closed at a retrial, the judge dismissed the case against Rabell on the ground that the SEC had never had any intention of using him as a witness, so that whatever Jones gave him could not have been a bribe, although it might have been extortion. *Rabell Bribe Case Dismissed by Judge*, *supra*.

209. *SEC Seeks Writ Against J.E. Jones*, *supra* note 202.

210. J. EDWARD JONES, AND SO—THEY INDICTED ME! 26–28 (1938).

storage and keep him there till the next Ice Age.”²¹¹ Jones, for his part, told an associate that he “wanted to ruin . . . [SEC] Chairman [Joseph] Kennedy.”²¹²

As a result of a five-week investigation of Jones’s operations, the SEC in February 1935 obtained an injunction against Jones and his associates.²¹³ According to the SEC, the investigation had disclosed that Jones was paying what he called dividends on oil royalties that were in fact the proceeds of sales of other securities, and that “Jones’s profit in many instances approximated 700 per cent.”²¹⁴ “[A]s a tactical move,” Jones said, he consented to the temporary injunction even though he denied the SEC’s allegations.²¹⁵ He intended to challenge the constitutionality of the Securities Exchange Act when the SEC sought a permanent injunction.²¹⁶

Before that happened, though, Jones filed a registration statement in May for a new offering of rights to participate in the distribution of oil royalties. This eventually became the vehicle for Jones’s attack on the SEC’s constitutionality. The SEC told Jones that it proposed to direct him to stop offering the rights, saying that his registration statement appeared to contain untrue statements and to omit other facts that investors would find important. Under the Securities Exchange Act, the registration would become effective on May 24. On May 23, the SEC sent Jones a telegram saying that it would hold a hearing on the statements on June 6, later postponed until June 18. On June 13, the SEC issued a subpoena directing that Jones appear with his business records. Jones refused to comply with the subpoena. Instead, on the new hearing date, he had his attorney seek to withdraw the registration statement. William Green, the hearing officer, refused the request, relying on an agency rule saying that the agency had discretion to refuse to allow registrants to withdraw their filings.²¹⁷ Otherwise, the SEC’s lawyer told Green, sellers like Jones could “go right up under the gun of a stop order” and then withdraw the offering.²¹⁸

211. *SEC Seeks Writ Against J.E. Jones*, *supra* note 202.

212. *Jones Is Witness at Trial of Rabell*, N.Y. TIMES, Sept. 27, 1935, at 8.

213. *J.E. Jones Enjoined in Oil Royalties*, N.Y. TIMES, Feb. 9, 1935, at 21.

214. *Id.*

215. *Id.*

216. *Fails to Answer Subpoena by SEC*, N.Y. TIMES, June 19, 1935, at 29.

217. *Id.*

218. *Id.*

When Jones evaded another subpoena, the SEC went to court for an order directing Jones to appear. Jones appealed the trial court's decision granting that order, and the court of appeals affirmed the order. Judge Martin Manton's opinion dismissed Jones's constitutional arguments, finding that Congress could use its power to regulate the mails to make it unlawful to sell unregistered securities.²¹⁹ Jones supplemented his regular lawyers for his appeal to the Supreme Court. He hired Bainbridge Colby, a New York lawyer who had been Woodrow Wilson's Secretary of State, and James M. Beck, an archconservative who had been Solicitor General in the Harding administration before winning a seat in the House of Representatives.²²⁰

Beck and Colby devoted most of their argument to attacking the SEC's constitutionality,²²¹ leaving to the final pages of their brief the argument that the SEC had to allow Jones to withdraw his registration statement and so had no power to subpoena him after that.²²² On the SEC's denial of the statement's withdrawal, Jones's lawyers told the Supreme Court that the SEC was on a "fishing expedition," which Jones undoubtedly saw as a continuation of its Javert-like pursuit of an innocent man.²²³ Beck made what turned out to be a crucial point about the refusal of withdrawal: publicity about a pending SEC action would inevitably make it difficult for even "the great house of J.P. Morgan" to issue stock, because SEC action, even at a preliminary stage, would suggest that the issuer could not be trusted.²²⁴ The government's brief, signed by Stanley Reed and written

219. *Jones v. SEC*, 79 F.2d 617, 619 (2d Cir. 1935).

220. Brief for Petitioner, *Jones v. SEC*, 298 U.S. 1 (1936) (No. 640); William F. Swindler, *Constitutional Retrospect: The First Series of Cutler Lectures Revisited*, 23 WM. & MARY L. REV. 1, 2 (1981) ("James M. Beck of Pennsylvania . . . had been Solicitor General of the United States under President Harding and by 1935 would be a vigorous critic of the New Deal."); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 77 (1999) (referring to "Bainbridge Colby, the last Secretary of State to serve in the Wilson administration").

221. Brief for Petitioner, *supra* note 220, at 9–56. The heart of the constitutional argument was the seemingly peculiar point that the registration requirement did nothing to prevent fraud because a completely fake security could be offered through the mails as long as the registration statement made it clear that the security was indeed a fake. *Id.* at 9; *Securities Act Held Violation of State Rights*, WASH. POST, Mar. 11, 1936, at 5.

222. Brief for Petitioner, *supra* note 220, at 57–71.

223. *Id.* at 58; *Securities Act Held Violation of State Rights*, *supra* note 221.

224. See *SEC Rights Argued in Supreme Court*, N.Y. TIMES, Mar. 11, 1936, at 1. Apparently Justices Butler and McReynolds were particularly exercised about the way in which the SEC had publicized its rule on withdrawing registration statements, in the mistaken belief that the

with the assistance of the SEC's chief counsel John Burns and Department of Justice attorneys Charles Horsky and Alger Hiss, was a bit more balanced, but it, too, focused on the constitutional question.²²⁵

The Supreme Court did not. After the oral argument, Landis wrote Frankfurter that "[t]he only possibility of defeat is on a procedural point," which turned out to be accurate, and that he could not "see a sane bench of judges not giving us some freedom in working out our procedural technique," which was not.²²⁶ A six-Justice majority held that Jones had an absolute right to withdraw his registration statement before it became effective.²²⁷ Justice Sutherland noted that the statute had no provision dealing with withdrawal.²²⁸ Without guidance from the statute or indeed from any other statutes dealing with agency power, Sutherland turned to judicial practice. The settled rule, he said, was that plaintiffs had an "unqualified right" to dismiss a complaint unless doing so would harm the defendant.²²⁹ The SEC's regulation, which said that the Commission "shall" give consent to a dismissal "with due regard to the public interest and the protection of investors," was, to Sutherland, the same as the judicial rule.²³⁰ And he found nothing in the record to indicate what prejudice could result from withdrawing a registration statement before the SEC had acted: "an abandonment of the application was of no concern to anyone except" Jones.²³¹

Sutherland went on to offer an "additional reason" for giving registrants an absolute right to withdraw.²³² The SEC's notice to Jones

rule, which was first announced in a press release, had not been more formally placed in the official register of agency actions. *See id.* ("[Jones's attorney] asserted that nowhere in the Securities Act[of 1933, 15 U.S.C. §§ 77a-77b (2006),] did Congress deny the right to withdraw a registration statement, and added that the basis of this compulsion came through a commission regulation, of which notice was given only in a release to the newspapers. Justices Butler and McReynolds . . . seemed impressed with the 'lack of publication' of this ruling."); *Securities Act Held Violation of State Rights*, *supra* note 221 ("Later it was developed that now all of the commission's rules are published in the Federal Register.").

225. *See* Brief for the Respondent, *Jones v. SEC*, 298 U.S. 1 (1936) (No. 640).

226. Letter from James Landis to Felix Frankfurter (Mar. 11, 1936) (on file with the Harvard Law School Special Collections Library).

227. *Jones*, 298 U.S. at 21-22.

228. *Id.* at 19.

229. *Id.* at 21-22.

230. *Id.* at 22.

231. *Id.* at 23 ("The possibility of any other interest in the matter is so shadowy, indefinite, and equivocal that it must be put out of consideration as altogether unreal.").

232. *Id.*

informed him that the agency had questions about the registration statement, and “invited” him to explain why the registration should not be suspended.²³³ But, “[i]n the face of such an invitation, it is a strange conclusion that the registrant is powerless to elect to save himself the trouble and expense of a contest by withdrawing his application,” which “accomplishes everything which a stop order would accomplish.”²³⁴ All this was largely unexceptionable.

And then the rhetoric escalated dramatically. As Sutherland wrote,

The action of the commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. . . . [T]o the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy.²³⁵

“Arbitrary power and the rule of the Constitution,” he continued, “cannot both exist.”²³⁶ Accepting the Progressive account of modern government, Sutherland described agencies as “necessarily called . . . into existence by the increasing complexities of our modern business and political affairs,” and said that they could not be “permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges, and immunities of the people.”²³⁷ Otherwise, “we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties.”²³⁸

The SEC tried to defend its refusal to allow the withdrawal by asserting that the submission of the registration statement triggered a general authority to investigate Jones’s business activities. Sutherland disagreed. The only point to the SEC’s inquiry was to examine the registration statement. Once Jones withdrew it, the SEC had not identified any other reason for an investigation. Sutherland cited earlier statements condemning “fishing expedition[s],” and quoted a well-known lower court opinion harshly describing such inquiries as

233. *Id.*

234. *Id.*

235. *Id.* at 23–24.

236. *Id.* at 24.

237. *Id.*

238. *Id.* at 23–24.

“intolerable tyranny”: they were “general, roving, offensive, inquisitorial, [and] compulsory, . . . without any allegations, upon no fixed principles, and governed by no rules of law.”²³⁹ To Sutherland, “An investigation not based upon specified grounds is . . . as objectionable as a search warrant not based upon specific statements of fact.”²⁴⁰ Further, “[t]he fear that some malefactor may go unwhipped of justice weighs as nothing against this just and strong condemnation of a practice so odious.”²⁴¹ After all, Sutherland observed, there were other ways of investigating Jones’s practices—a criminal investigation and grand jury indictment.²⁴²

Sutherland’s position had some merit. He went too far, though, in linking the SEC’s inquiry to the “intolerable abuses of the Star Chamber,” and insisting that “[e]ven the shortest step in the direction of curtailing” the right against “unlawful inquisitorial investigations . . . must be halted *in limine* lest it serve as a precedent for further advances in the same direction.”²⁴³ Somehow Sutherland discerned in the government’s position the “philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow.”²⁴⁴

Exactly what all this had to do with the *Jones* case itself remained quite unclear. Perhaps in his own eyes Jones was pure as the driven snow, but the 1935 injunction against him suggested otherwise.²⁴⁵ It was not obviously arbitrary for the SEC to exercise an informed discretion to inquire into the honesty of his most recent effort to sell securities. Frankfurter’s and Stone’s comments on the opinion seem apt. As Frankfurter wrote to Stone, “Sutherland writes as though he were still a United States Senator, making a partisan speech.” To this, Stone replied that *Jones* “was written for morons, and such will no doubt take comfort from it.”²⁴⁶ In another letter to Frankfurter, Stone described the opinion as full of “platitudinous irrelevancies,”

239. *Id.* at 26 (quoting *Ellis v. ICC*, 237 U.S. 434, 445 (1915)); *id.* at 27 (quoting *In re Pac. Ry. Comm’n*, 32 F. 241, 263 (C.C.N.D. Cal. 1887)).

240. *Id.* at 27.

241. *Id.*

242. *Id.* at 27–28.

243. *Id.* at 28.

244. *Id.* at 27.

245. Jones’s strategic decision not to contest the injunction weakened any inferences that could be drawn from that episode.

246. Letter from Felix Frankfurter to Harlan F. Stone (Apr. 7, 1936) (on file with the Harvard Law School Special Collections Library); Letter from Harlan F. Stone to Felix Frankfurter (Apr. 7, 1936) (on file with the Harvard Law School Special Collections Library).

“set[ting] at naught a plain command of Congress, without the invocation of any identifiable prohibition of the Constitution.”²⁴⁷

Justice Cardozo wrote a brief dissent, in which Brandeis and Stone joined. He acknowledged that Sutherland’s reminders “of the dangers that wait upon the abuse of power by officialdom unchained” were “so fraught with truth that [they] can never be untimely.”²⁴⁸ But, he continued, “[T]imely too is the reminder, as a host of impoverished investors will be ready to attest, that there are dangers in untruths and half truths when certificates masquerading as securities pass current in the market.”²⁴⁹ Evoking Brandeis’s favorite dictum that sunlight is the best disinfectant, Cardozo said that such wrongs “must be dragged to light and pilloried.”²⁵⁰ Sutherland’s analogy to the Star Chamber and similar practices were, Cardozo wrote, “strange.”²⁵¹ The “denunciatory fervor” with which the analogy was made led to the understated observation that “[h]istorians may find hyperbole in the sanguinary simile.”²⁵²

Turning from the rhetoric in and philosophy animating Sutherland’s opinion, Cardozo constructed a straightforward legal argument against Jones. Cardozo found the SEC rule allowing withdrawal of registration statements only with the SEC’s consent to be valid.²⁵³ With that as a predicate, the continuing inquiry into Jones’s practices was not “a roving examination.”²⁵⁴ The rule made sense because “[r]ecklessness and deceit do not automatically excuse themselves by notice of repentance”;²⁵⁵ even a withdrawn registration statement might support civil or criminal liability. Congress wanted to make sure that “retribution for the past is added to prevention for the future” by giving “overlap[ping]” authority to the SEC and the Department of Justice and by providing for immunity from criminal prosecution for statements made under compulsion to the SEC.²⁵⁶

247. Letter from Harlan F. Stone to Felix Frankfurter (Apr. 9, 1936) (on file with the Harvard Law School Special Collections Library).

248. *Jones*, 298 U.S. at 32 (Cardozo, J., dissenting).

249. *Id.*

250. *Id.*

251. *Id.* at 33. Cardozo observed that, unlike the Court of Star Chamber, the SEC lacked the power to imprison or punish for contempt, and its regulatory actions were subject to judicial review. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 29.

255. *Id.* at 30.

256. *Id.* at 30–31.

Cardozo ended his opinion, "The Rule now assailed was wisely conceived and lawfully adopted to foil the plans of knaves intent upon obscuring or suppressing the knowledge of their knavery."²⁵⁷

Jones was of a piece with *St. Joseph Stock Yards*. The majorities in both cases were to some degree skeptical about the fairness of proceedings before some administrative agencies. In both cases, the majority sought refuge in general and formalistic rules that would constrain imperfect agencies. In both, the majority accepted the fact that the rules would also interfere with the smooth operation of well-functioning agencies. That was the import of Hughes's reference to "subservient" agencies²⁵⁸ and of Sutherland's insistence that incursions on rights had to be stopped at their seemingly mild onset. The dissents in both cases were confident that courts could "[stick] close to the practicalities of government as revealed by history,"²⁵⁹ and that they could accurately apply "pragmatic test[s] of workability in an imperfect world."²⁶⁰ Their confidence in the courts led them to place a lower value than the majority on the possibility (or, as the majorities would have said, the fact) that some agencies would sometimes go off the rails.

SEC chair James Landis issued a statement saying that the *Jones* decision "would put some difficulties in the way of labeling fraudulent promoters as such," but that the Commission's work would go on because most of the agency's investigations involved registrations that had taken effect.²⁶¹ A story in the *Wall Street Journal* observed that the decision left some uncertainty about the SEC's power because it indicated that the agency could investigate after a registration became "effective" without defining what the effective date of a registration was.²⁶² It suggested that aggressive lawyers for securities issuers could take advantage of the Court's condemnation of "fishing expeditions" to challenge investigations undertaken pursuant to statutory

257. *Id.* at 33.

258. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 52 (1936).

259. Felix Frankfurter, *Mr. Justice Cardozo and Public Law*, 48 YALE L.J. 458, 477-78 (1939).

260. Dean G. Acheson, *Mr. Justice Cardozo and Problems of Government*, 37 MICH. L. REV. 513, 524 (1939). That article and Frankfurter, *supra* note 259, are tributes to Cardozo occasioned by his death.

261. *Landis to Keep Up Fight on Frauds*, N.Y. TIMES, Apr. 7, 1936, at 18.

262. *Supreme Court Decree Creates Uncertainty over SEC Powers*, WALL ST. J., Apr. 13, 1936, at 5.

provisions mentioned but not involved in the *Jones* decision.²⁶³ Reflecting Wall Street's general satisfaction with the disclosure regime administered by the SEC, editorialists at the same paper were as little disturbed as Landis.²⁶⁴ The decision left "[n]o [c]asualties," as their editorial was titled.²⁶⁵ Nothing in the decision "seriously impair[ed] the usefulness" of the SEC, because the decision, "[a]t most, admonishe[d] SEC that it [did] not possess a specific power No part of the very great amount of excellent work the SEC ha[d] done was based upon" its power to continue an investigation after a registration statement had been withdrawn, the editorial argued.²⁶⁶ It reassured its readers that "[p]ublic security offerings remain[ed] as fully subject to the Commission's scrutiny as ever."²⁶⁷

Newspaper commentators on the Court's work saw in the decision "the characteristic cleavage of opinion between the members of the [C]ourt on problems arising out of the relation of government to the individual."²⁶⁸ Dean Dinwoodie, writing in the *New York Times*, focused on the "uncompromising tone" used by Sutherland and Cardozo.²⁶⁹ Sutherland's "warning" was "seemingly not demanded by the particular case at hand."²⁷⁰ Arthur Krock's regular column on politics was more critical.²⁷¹ Sutherland and his colleagues "[were] determined to let no occasion pass, no word go unsaid, to check any possibility of invasion, by bureau or commission, of what they consider[ed] the constitutional reservations of Congress and the courts," whereas Cardozo and his colleagues "obviously consider[ed] that the majority [was] overzealous and even imaginative in discovering these invasions."²⁷² Sutherland "spared" no "space and diction . . . in the writing of resounding passages about the guarantees and reservations of the Constitution," whereas Cardozo "suggested with none too faint irony that this majority prose booms louder than

263. *Id.*

264. *No Casualties*, WALL ST. J., Apr. 8, 1936, at 6.

265. *Id.*

266. *Id.*

267. *Id.*

268. Dean Dinwoodie, *SEC Case Revives Old Court Division*, N.Y. TIMES, Apr. 12, 1936, at E7.

269. *Id.*

270. *Id.*

271. Arthur Krock, *Supreme Court Once Again Splits on Fundamentals*, N.Y. TIMES, Apr. 7, 1936, at 24.

272. *Id.*

is necessary.”²⁷³ The lay reader, represented by Krock himself, saw the Justices “debating political philosophy, having in mind the general methods and tendencies of the New Deal. Mr. Jones and his struggle with the SEC were but incidents in the argument.”²⁷⁴ For the *Washington Post*, Sutherland’s “castigat[ion]” of the SEC was particularly ironic because, “of all the New Deal eggs that were spawned, the SEC, with James M. Landis as its present head, ha[d] been acclaimed on all sides for its sensible caution in administering the law.”²⁷⁵

Having returned to Harvard Law School as dean after serving as chair of the SEC, Landis had a unique and personal perspective on the case. In his Storrs Lectures two years after the *Jones* decision Landis quoted Sutherland’s reference to the Star Chamber. Reflecting a bit of the outrage that Frankfurter had expressed, he said that this “outburst indicates that one is in a field where calm judicial temper has fled.”²⁷⁶ The Court’s approach, Landis suggested, would have “the effect, if not the purpose,” of “breed[ing] distrust of the administrative.”²⁷⁷ Still, Landis remained calm, perhaps to contrast his rhetoric with Sutherland’s. He suggested that the courts were defensive because they understood that agencies had proliferated because of the courts’ “inadequacies.” He further noted that the Supreme Court’s important cases were all divided, and that the dissenters were likely to prevail in the long run: “[b]ecause their reasoning seem[ed] more to accord with the temper of the times, it [was] they, rather than the majority, who [were] likely to gain adherents to their position.”²⁷⁸

273. *Id.*

274. *Id.*

275. *Justices Cracked Down on SEC*, WASH. POST, Apr. 12, 1936, at B2. That article also referred to the “well-known” split between liberals and conservatives. *Id.*

276. LANDIS, *supra* note 6, at 139.

277. *Id.* at 140.

278. *Id.* at 141. The Roosevelt administration took up Sutherland’s suggestion that the proper course of action was a criminal prosecution. The Department of Justice immediately convened a grand jury to investigate Jones’s activities, and a month after the Court rebuffed the SEC, the Department of Justice indicted Jones on fifteen counts of mail fraud, citing statements he had made that his oil royalty investments were “scientifically appraised” and “profitable investments,” and alleging that he had skimmed profits off of the trusts. *J.E. Jones Indicted on 15 Fraud Counts*, N.Y. TIMES, May 9, 1936, at 10. Unfazed, Jones described the prosecution as “mad persecution advanced to the most pitiable stages of New Dealirium.” *Id.* He “warn[ed] against the dangers of vicious governmental malevolence bent on riding roughshod over individual rights” and denounced the government’s “continual hounding” of him. *Id.* The case came to trial a year later, with Jones represented by the noted trial lawyer Lloyd Stryker. After

D. The Morgan Cases

The *Jones* case attracted a fair amount of attention in the newspapers, perhaps because of Jones's colorful personality.²⁷⁹ The New Deal's next confrontation with the Supreme Court over administrative law made the front pages because Henry Wallace believed that the Court had impugned his character in reversing a rate decision he personally had made.

The episode, which ended up generating five Supreme Court opinions, began—as had the *St. Joseph Stock Yards* case—with an inquiry, following the market collapses of the 1920s, into the rates charged by commission men at Kansas City stockyards.²⁸⁰ After two years of examination, the Hoover administration's Secretary of Agriculture entered an order in May 1932 that reduced the rates by about 10 percent.²⁸¹ The commission men asked that the hearing be reopened “in view of changed economic conditions,” and new testimony was developed from July through November 1932.²⁸² The matter had reached the Secretary of Agriculture's office when the new administration came in. Wallace believed that there were too many commission men and agencies, with “too much competition in the business.”²⁸³ His basic theory was that sales agencies incurred fixed costs that did not vary with the amount of business, and that “too much competition” meant that rates had to cover too many of these fixed costs.²⁸⁴ Wallace reduced the rates even further to reflect what he believed were more reasonable salaries for a more reasonable number of commission men.²⁸⁵

hearing testimony for about a month, the jury acquitted Jones, deliberating for less than four hours. *Jones Is Acquitted in Mail Fraud Case*, N.Y. TIMES, May 1, 1937, at 7. Not one to give up after winning, Jones then self-published a book, *And So—They Indicted Me!*, JONES, *supra* note 210, and unsuccessfully sued Joseph Kennedy and James Landis for \$1 million for the damage they had done, he said, to his reputation. *Court Rejects Suit of J.E. Jones v. SEC*, N.Y. TIMES, Apr. 22, 1939, at 24. He remained in the oil business, out of the public eye, until 1947 when he resurfaced by signing a contract with the Mexican government to drill one hundred wells there. *Oil: Foot in the Door*, TIME, Sept. 22, 1947, at 88, 88–89.

279. See *supra* notes 261–75 and accompanying text.

280. *Morgan v. United States*, 298 U.S. 468, 471 (1936).

281. *United States v. Morgan*, 307 U.S. 183, 199 (1939) (Butler, J., dissenting); *Morgan*, 298 U.S. at 471–72.

282. *Morgan*, 298 U.S. at 472.

283. *Id.*

284. *Id.* at 473.

285. *Id.* A report in 1938 quoted an estimate that the fee reduction was 12.61 percent. Chesly Manly, *Court Rebukes Wallace; Voids His Rate Order*, CHI. DAILY TRIB., Apr. 26, 1938, at 21, 23.

The commission men appealed to a special three-judge court and then to the Supreme Court. They hired a heavy hitter to represent them: Frederick H. Wood of New York, a staunch opponent of the New Deal who had successfully argued *A.L.A. Schechter Poultry Corp. v. United States*²⁸⁶ and *Carter v. Carter Coal Co.*,²⁸⁷ the latter just six weeks before he appeared in the Supreme Court again to present the argument for the commission men.²⁸⁸

The commission men were most concerned about the rates, but they added a procedural challenge to their appeal. The Packers and Stockyards Act required that the Secretary of Agriculture give the middlemen a “full hearing,”²⁸⁹ and the commission men alleged that they had not had a full hearing. They identified what they regarded as three key deficiencies in the procedures. First, they had asked the hearing examiner in the 1932 proceedings to “prepare a tentative report” to which they could respond with an oral argument in front of the Secretary of Agriculture. But no such report was prepared.²⁹⁰ Second, they objected to the fact that the evidence had been presented to R.W. Dunlap and Rexford Tugwell as Acting Secretaries of Agriculture, whereas the statute required that only the Secretary could set rates.²⁹¹ And, finally, industry gossip led them to allege that Wallace “had not personally heard or read any of the evidence presented,” nor had he read the briefs prepared by the middlemen or heard any oral arguments from them, but that he had instead relied entirely on “consultation with employees in the Department of Agriculture out of the presence” of the commission men’s lawyers.²⁹² The lower court held that these allegations were irrelevant.²⁹³ The implication of this holding was that even if everything the commission men said was true, they had still had the “full hearing” the statute required.

286. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

287. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

288. *Morgan*, 298 U.S. at 468.

289. Packers and Stockyards Act, 1921, ch. 64, §§ 309–310, 42 Stat. 159, 165–67 (codified as amended at 7 U.S.C. §§ 210–211 (2006)).

290. *Morgan*, 298 U.S. at 475.

291. *Id.* at 482 n.1.

292. *Id.* at 476.

293. See *Morgan v. United States*, 8 F. Supp. 766, 768 (W.D. Mo. 1934) (“We think it is unnecessary now to elaborate the obvious observation that the theory of these allegations is supported by nothing in the act and that a construction of the act consistent with that theory would destroy it altogether as a measure capable of practical administration.”), *rev’d*, 298 U.S. 468 (1936).

The Supreme Court unanimously disagreed with the lower court's ruling on the "full hearing" question. Chief Justice Hughes's opinion set aside some of the commission men's objections.²⁹⁴ Acting Secretaries heard the commission men's objections to the proposed rates, but Tugwell had left the final decision to Wallace. Noting in passing that Wallace could have delegated the authority to set rates to his subordinates, although he had not done so here, Hughes endorsed administrative freedom to organize bureaucracies in ways that administrators found to be most effective.²⁹⁵

The heart of the problem, though, was that, according to the allegations, Wallace had set the rates "without having heard or read any of the evidence" or even any of the briefs prepared by the commission men's lawyers, relying entirely on informal "consultations" with department employees.²⁹⁶ If those allegations were true, Hughes wrote, the commission men would not have had the "full hearing" the statute required. Hughes distinguished between "ordinary administration" and ratemaking, although the precise distinction was obscure, seemingly having something to do with the special requirements Congress had placed on ratemaking proceedings.²⁹⁷ When Congress had "requir[ed] the taking and weighing of evidence, [and] determinations of fact based upon the consideration of the evidence," the proceedings were "*quasi-judicial*," and brought into play "the tradition of judicial proceedings" in which "the one who decides shall be bound in good conscience to consider the evidence." Hughes continued that "[t]he 'hearing' [was] the hearing of evidence and argument. If the one who determine[d] the facts which underl[ay] the order ha[d] not considered evidence or argument, it [was] manifest that the hearing ha[d] not been given."²⁹⁸

The government contended that the statute's requirement was satisfied if "the Department of Agriculture," considered as a single entity without looking inside it to see who actually did what, set the

294. According to Hughes, the commission men could have had the statutory full hearing even if the hearing examiner had not prepared a report and let the parties see it before the Secretary decided. That would have been "good practice" and had been "found to be of great value" in ICC proceedings, but it was not "essential to the validity of the hearing." *Morgan*, 298 U.S. at 478.

295. *Id.* at 478–79.

296. *Id.* at 478.

297. *Id.* at 479.

298. *Id.* at 480–81.

rates, and that courts could set aside rates unsupported by evidence.²⁹⁹ The problem, Hughes saw, was that courts deferred to agency factfinding because they assumed “that the officer who makes the findings has addressed himself to the evidence.”³⁰⁰ The government’s “Department as a whole” theory, Hughes wrote, would allow one official to hear and consider the evidence and make findings and another official to set those findings aside “for reasons of policy” without considering “either evidence or argument.”³⁰¹ Because decisionmakers could use “assistants” to “sift[] and analyze[]” the evidence, and because arguments could be oral or written, requiring the decisionmaker to hear and consider evidence would not burden the administrative state.³⁰² What mattered was substance, and substance required that “the officer who makes the determinations must consider and appraise the evidence which justifies them.”³⁰³ Hughes concluded tersely, “The one who decides must hear.” The case was remanded to the lower court to find out whether the allegations about Wallace’s decisionmaking process were true.³⁰⁴

Consistent with Hughes’s views about the modest effects of the ruling on the operation of a modern bureaucracy, Wallace and other New Dealers took the decision in stride. They believed that what they had done was entirely consistent with what Hughes has described as an adequate “full hearing.” They were outraged, though, when Hughes offered what major newspapers called a “rebuke” to Wallace when the case returned to the Court two years later.³⁰⁵

The problem began when the lawyers for the commission men investigated how Wallace had actually gone about making his decision. They submitted forty-six interrogatories to Wallace, who seemed to be exercised as much by the number as by the content of the questions.³⁰⁶ Although Wallace found it difficult to retrieve

299. *Id.* at 481.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at 481–82.

304. *Id.* at 482.

305. *See Court Rebuke His Own Fault, Aide to Hoover Tells Wallace*, WASH. POST, May 24, 1938, at X2; *High Court Rebuke to Wallace Sharp*, N.Y. TIMES, May 1, 1938, at 2; Manly, *supra* note 285; *see also Court Warns U.S. Agencies to Play Fair*, WASH. POST, Apr. 26, 1938, at X1 (noting that Chief Justice Hughes “judicially rebuked Wallace”); *Supreme Court Voids Wallace Order Fixing Stockyard Rates*, WALL ST. J., Apr. 26, 1938, at 5 (“The Supreme Court sharply rebuked Secretary of Agriculture Wallace . . .”); *infra* text accompanying notes 340–41.

306. Ernst, *supra* note 144, at 453.

detailed memories of events that had taken place more than three years before, his answers, prepared in consultation with his lawyer, Solicitor General Robert Jackson, showed that Wallace had personally evaluated the evidence and made the decision.³⁰⁷ The one who decided had indeed heard.

The answers, though, also revealed the catch-as-catch-can process of decisionmaking in the early days of the New Deal—and, perhaps, within any complex bureaucracy. Staff members, lawyers, and supervisors wandered the halls, had occasional conversations, dropped into offices to discuss aspects of the record, and produced documents that worked their way into Wallace's hands.³⁰⁸ The staff lawyer in charge of the case for the Department of Agriculture compiled a set of proposed findings of fact and delivered them to Wallace, who said that he would read them at home.³⁰⁹ Over the next two weeks, Wallace argued with Mohler about the level at which the rates should be set, with Mohler taking the commission men's side. In the end Wallace concluded that there were too many agencies in Kansas City and that the number could be reduced if the rates they were allowed to charge were reduced.³¹⁰ The strongly anti-New Deal *Chicago Daily Tribune*, sympathetic to the commission men, gave a political spin to Wallace's decision: "As there are only a few dozen commission men in Kansas City as against tens of thousands of farmers who send livestock there to be marketed, a lowering of the fees can make few political enemies and many friends."³¹¹

Wallace and his lawyers believed they had done all that Chief Justice Hughes said they should have. The oral argument took an unexpected turn, though, when the Justices began to focus not on whether Wallace had read the evidence and made the decision but rather on how informal the deliberative process was; the Justices probed topics such as whether the commission men's lawyers had seen proposed findings of fact (they had not) and whether they had been given an opportunity to comment on the material Wallace received (which, again, they had not).³¹² These questions

307. *Id.* at 453–54.

308. *Id.* at 450–51.

309. *Id.* at 451.

310. *Id.*

311. *Mr. Justice Black Dissents*, CHI. DAILY TRIB., Apr. 29, 1938, at 10.

312. See Ernst, *supra* note 144, at 454 (quoting questions at oral argument).

foreshadowed the decision that Hughes announced six weeks after the argument.

With the facts in hand, Hughes concluded that the commission men had not in fact had the “full hearing” the statute required.³¹³ Invoking the standard Progressive account of the administrative state’s origins, Hughes emphasized that the “vast expansion of this field of administrative regulation in response to the pressure of social needs” had to be accompanied by “adherence to the basic principles.”³¹⁴ Those principles included clear legislative guidance to the agencies Congress created and the rule “that, in administrative proceedings of a *quasi*-judicial character, the liberty and property of the citizens shall be protected by the rudimentary requirements of fair play,” which included “a fair and open hearing.”³¹⁵ Hughes recited the facts, contrasting the “voluminous testimony” with the “general and sketchy oral argument” held when presentation of evidence had concluded.³¹⁶ Offering a series of rhetorical negatives, Hughes wrote that “[n]o brief was at any time supplied by the Government. . . . [T]he Government formulated no issues and furnished appellants no statement or summary of its contentions and no proposed findings.”³¹⁷ After Wallace had formulated his findings of fact, “[n]o opportunity was afforded to appellants for the examining of the findings . . . until they were served with the order.”³¹⁸ Wallace “did not hear the oral argument,” and only “dipped into” the “bulky record” from time to time to get its drift.³¹⁹ He read the briefs and the transcript of oral argument, and had “several conferences” with the department’s chief lawyer and with staff members in the Bureau of Animal Industry.”³²⁰

For Hughes, a full hearing “require[d] more than that.”³²¹ Such a hearing required that the parties have “a reasonable opportunity to

313. *Morgan v. United States (Morgan II)*, 304 U.S. 1, 18 (1938). Justices Cardozo and Reed did not participate in the decision, the former because of illness, Justices of the Supreme Court, 304 U.S. iii, iii n.2 (1938), the latter because he had been involved with the case while he was at the Department of Justice, *see Morgan v. United States*, 298 U.S. 468, 469 (1936) (listing the attorneys representing the United States).

314. *Morgan II*, 304 U.S. at 14.

315. *Id.* at 14–15 (internal quotation marks omitted).

316. *Id.* at 16.

317. *Id.*

318. *Id.* at 24.

319. *Id.* at 17.

320. *Id.* at 18.

321. *Id.*

know the claims of the opposing party and to meet them.”³²² The Department of Agriculture’s practice did not offer that reasonable opportunity. There was “no specific complaint” and no report by the hearing examiner that would help shape the later proceedings.³²³ When Congress required a “full hearing,” it had “judicial standards” in mind, “not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process.”³²⁴ Fairness was absent, Hughes wrote, when “the plaintiff’s attorney . . . formulate[d] the findings . . . , [and the judge] conferred *ex parte* with the plaintiff’s attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections.”³²⁵ In a simple case, perhaps the Secretary—the one who decides—could preside over a hearing and “make his findings on the spot,” or in a more complex one, “receive the proposed findings of both parties, each being notified of the proposals of the other.”³²⁶ It was, though, “a vital defect” and not a mere “irregularity” that Wallace had adopted the findings prepared by “the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents . . . to know the claims thus presented.”³²⁷

Hughes finished with a flourish: maintaining “proper standards” in hearings “in no way cripple[d] or embarrass[e] the exercise” of an agency’s power, but actually was “in [its] manifest interest. . . . [I]f these multiplying agencies . . . [were] to serve the purposes for which they [had been] created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.”³²⁸ Justice Black, newly appointed to the Court, dissented without opinion.³²⁹

Although Wallace’s initial reaction was temperate³³⁰—a statement that the Court’s decision would not affect ratemaking because the department had already changed its practices—he soon

322. *Id.*

323. *Id.* at 19.

324. *Id.*

325. *Id.* at 20.

326. *Id.* at 22.

327. *Id.*

328. *Id.*

329. *Id.* at 26 (Black, J., dissenting).

330. *Wallace on Court Verdict*, WALL ST. J., Apr. 29, 1938, at 3.

became upset.³³¹ Wallace believed that the Court was engaging in a bait and switch, saying in its initial decision that all it needed to know was whether Wallace himself had made the decision—which he had—but saying later that the process in which Wallace had engaged had denied the commission men “the rudimentary requirements of fair play.”³³² With other New Dealers, he was quite uncertain about what the Supreme Court was demanding of administrative proceedings. In round one, the Court had said that it would merely be good practice to prepare proposed findings of fact and allow the commission men’s lawyers to read, comment on, and possibly object to them; in round two, it seemed that the Court might be requiring the preparation of such proposed findings.³³³

Perhaps more important, Hughes’s opinion seemed to cast doubt on the kind of informal consultations within the bureaucracy that were almost inevitable, treating them as occasions on which sinister influences might be exerted rather than as the way in which bureaucrats with different areas of expertise exchange information and work out solutions to the complex problems handed to them.³³⁴

And perhaps most important, Wallace saw Hughes’s opinion as an effort to revive the obstructionism he and his colleagues in the New Deal thought had been defeated in the prior year’s struggle with the Court. At a press conference three weeks after the Court’s decision, Wallace said, “One year ago a great battle was fought to decide whether the courts could take over the function of determining policy for the nation. That battle was suspended when the courts retreated from the legislative field. This year another battle seems to be opening.”³³⁵ A week later, editorialist and constitutional historian Merlo J. Pusey echoed Wallace’s sense of what was at stake in an editorial column entitled “New Court Fight?”³³⁶ Implicitly drawing

331. *New Battle on Power of Court over Agencies Seen by Wallace*, WASH. POST, May 19, 1938, at X2.

332. *Id.*

333. The government’s immediate response to the decision reflected this confusion. The NLRB withdrew “several noteworthy cases” from the courts because it was concerned that the absence of an intermediate report from a hearing examiner would vitiate the proceedings. *Labor Board Recalls Cases, Due to Ruling*, WASH. POST, May 3, 1938, at X2. The Ford Motor Company moved for an inquiry into whether NLRB members had “discussed the issues” in the Board’s case against it with White House advisers and union leaders. *Id.*

334. See *Morgan II*, 304 U.S. at 22 (discussing procedural requirements of administrative hearings).

335. *New Battle on Power of Court over Agencies Seen by Wallace*, *supra* note 331.

336. Merlo J. Pusey, *New Court Fight?*, WASH. POST, May 25, 1938, at X9.

the same conclusion, the *Wall Street Journal* editorial page approved the Court's "sharp—and apparently needed—warning to all administrative agencies."³³⁷ That the decision "should have been necessary," the editorial continued, was "a sign of the times in which we live."³³⁸ The *Chicago Daily Tribune* noted that the decision showed "that the men and women who fought the court-packing proposal were right."³³⁹

Wallace decided to strike back at the Court, conducting his campaign on two fronts—public opinion and law. He wrote a long letter to the *New York Times* describing how he and the Department of Agriculture had made their decision, and chastising the Court for using the case as "a convenient peg on which to hang a statement" that "flash[ed] a warning to quasi-judicial agencies" and threatened to perpetuate "the interminable delays for which some [corporate lawyers] are famous." For Wallace, "The final court of appeal in the United States [was] the bar of public opinion,"³⁴⁰ and Wallace argued before that bar through this letter and letters he wrote to every U.S. Senator.³⁴¹

Wallace also pressed Solicitor General Jackson to file a petition for rehearing that would emphasize the bait-and-switch issue.³⁴² To no one's surprise, except perhaps Wallace's, the Court rejected the petition.³⁴³ The assertion that the decision was "directly contrary" to

337. *A Limit to Executive Powers*, WALL ST. J., Apr. 27, 1938, at 4.

338. *Id.*

339. *Mr. Justice Black Dissents*, *supra* note 311. Pusey modestly criticized Wallace for failing to have reopened the Kansas City proceedings after the Court's initial decision in 1936. Pusey, *supra* note 336.

340. *Secretary Wallace Explains Kansas City Rate Decision*, N.Y. TIMES, May 8, 1938, at 8E.

341. *See, e.g.*, 83 CONG. REC. 1922–23 (1938) (reprinting a representative letter from Wallace).

342. *See* Ernst, *supra* note 144, at 448 ("*Morgan II* and Wallace's response intensified an already polemical debate . . .").

343. Jackson's petition for rehearing pointed out another problem with the Court's decision. The lower courts had upheld Wallace's rate reductions, but allowed the commission men to charge the higher fees and deposit the proceeds with the court, to be returned to the shippers or the commission men depending on who ultimately won the lawsuit. By 1938, somewhere between \$750,000 and \$1 million was sitting in the account. The Court's opinion said nothing about what should happen to those funds, and the commission men were pressing that the money be turned over to them. *United States v. Morgan*, 313 U.S. 409 (1941). The Court left the disposition of the money to the lower court. *Id.* at 428. That decision generated the commission men's third trip to the Supreme Court, and the Court's fourth opinion. This time, though, the government won—before a Court on which Justices Frankfurter, Douglas, and Reed sat, though Reed did not participate in the decision. *Id.* (upholding the secretary's distribution of the accumulated funds).

the earlier decision was “unwarranted” and “wholly unfounded.”³⁴⁴ The government was “in no position to claim surprise.”³⁴⁵ The question raised by the first decision was whether the commission men had been given a “full hearing.”³⁴⁶ The Court had mentioned the possibility of an interim report by the hearing examiner, but it had not required one—nor did the new opinion.³⁴⁷ What mattered was fairness in the overall proceeding—and the cumulation of defects, each perhaps tolerable on its own, was the problem.³⁴⁸

This, the Court’s third opinion in the matter, eased the burdens that its second opinion might have placed on the administrative state. The simplest response would be to have hearing examiners prepare proposed findings of fact and to make them available to those subject to regulation. If that occurred, perhaps the informal discussions disparaged as “*ex parte* consultations” might be acceptable—a desirable result for complex cases in which hearing examiners might need assistance in developing the proposed findings. The administrative state would be pushed to adopt court-like procedures at an interim, though important, stage, but agencies would not have to transform themselves into courts. The adjustments required by *Morgan v. United States (Morgan II)*,³⁴⁹ as interpreted by the opinion on rehearing, would undoubtedly slow administrative action. But those adjustments would not bring the administrative state to a halt or even cause a dramatic decline in its ability to deal with social and economic change. The general intrusion of judicial modes of action had already hobbled the administrative state. No one could call a ratemaking proceeding that had begun in 1930 and remained open in 1938 expeditious. *Morgan II* made the situation worse, but only a bit worse.³⁵⁰

344. *Morgan v. United States (Morgan II)*, 304 U.S. 1, 23 (1938).

345. *Id.*

346. *Id.*

347. *Id.* at 25.

348. *Id.* at 25–26.

349. *Morgan v. United States (Morgan II)*, 304 U.S. 1 (1938).

350. Ernst, *supra* note 144, at 448. Ernst also emphasizes the importance Chief Justice Hughes, in *Morgan II*, gave to the development of a better trained corps of hearing examiners. See Ernst, *supra* note 144, at 449 (describing the opinion as “Hughes’s strong hint that the status of . . . trial examiners be elevated”).

E. Looking Backward and Forward from 1940

The New Deal's defenders of the modern administrative state knew they had lost all the important cases the Supreme Court had decided. Landis leveled acerbic criticisms at the Court; others offered almost equally severe criticisms in more temperate tones.³⁵¹ Yet, for all the criticisms, the New Dealers seemed not to have appreciated how much ground they had gained. The Court's major administrative law decisions were contemporaneous with the decisions that provoked the crisis of 1936 and 1937, and the Court's divisions here mirrored the divisions there—generally along lines conventionally described as conservative versus liberal. Perhaps the New Dealers were misled by this fact and distracted by some rhetorical flourishes in the Court's opinions. The New Dealers knew that administrative agencies were not, as Justice Sutherland had suggested in *Jones*, the modern version of the Star Chamber. If the Court so seriously misunderstood how agencies actually operated, New Dealers may have thought, it could not possibly be sympathetic to the administrative state at all. Further, the concept of expertise near the heart of the Progressive vision for administrative law referred to objective scientific facts. Any departure from deference to expert judgment was a departure from objective reality, or so the Progressive theorists may have thought. From that perspective, small movements away from the status quo toward administrative autonomy were no better than complete stasis or even regression to a Diceyan world.

The New Dealers themselves may have misunderstood how far the Court had gone to accommodate their theory of administrative law. They had argued that the modern administrative state required courts to withdraw almost entirely from supervising administrative agencies. Agency findings of fact, for example, should be completely binding on the courts. That aspiration was probably unrealistic in a world in which Diceyan ideas still had some purchase.³⁵² Progressive theorists had an unrealistic sense of what experts could accomplish, as their treatment of the idea of a fair rate of return—and their seemingly willful failure to think seriously about the partisanship of the NLRB—showed. The Hughes Court may have understood that

351. *E.g.*, Letter from James Landis to Felix Frankfurter, *supra* note 226.

352. For a discussion of Albert Venn Dicey's criticisms of the inherent lack of democratic accountability in administrative regimes, see *supra* notes 119–20 and accompanying text.

the limitations of expertise justified the kind of loose supervision of the administrative state that it developed. And even the Progressive theorists of administrative law in the 1930s recognized the continuing influence of mere—and mean—politics in administrative agencies. Preserving some role for the courts in supervising agencies could inhibit any further degeneration of the idealized administrative state they hoped to embed in the nation's constitutional scheme.

Still, failing to obtain 100 percent of what they sought was not in itself a defeat. Each of the “losses” in the Supreme Court allowed incursions on even a rather weak version of Diceyanism. *St. Joseph Stockyards* and *Consolidated Edison Co. v. NLRB*³⁵³ required the courts to defer substantially although not completely to agency findings of fact; the *Morgan* cases allowed hearing examiners to adopt rather loose procedures, looser than would have been tolerated from the ordinary courts to which Diceyans looked. Defenders of the administrative state might have lost every contentious case, but along the way they won a substantial amount—not everything, but a great deal. At the end of the 1930s the administrative state emerged largely unscathed—and perhaps even strengthened—by the Supreme Court.

By the end of the 1930s Frankfurter was in a position to write an opinion for the Court restating and endorsing the standard Progressive account of the rise of the administrative state and the Progressive vision of administrative procedure. In *FCC v. Pottsville Broadcasting Co.*,³⁵⁴ the Court reviewed a decision by the U.S. Court of Appeals for the District of Columbia criticizing the Federal Communications Commission (FCC) for failing to adhere to the instructions that court had given it. As Frankfurter saw it, the lower court had misunderstood its role when it applied a rule about what lower courts should do in response to a remand from a higher court. That rule made sense in its precise setting but was inappropriate when a court reviewed an agency's decision. “The technical rules derived from the interrelationship of judicial tribunals . . . are taken out of their environment when mechanically applied” to review of agency decisions.³⁵⁵ “Modern administrative tribunals . . . ha[d] been a response to the felt need of governmental supervision of economic enterprise—a supervision which could effectively be exercised neither

353. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).

354. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134 (1940). Justice McReynolds concurred in the result, without opinion. *Id.* at 146.

355. *Id.* at 141.

directly, through self-executing legislation, nor by the judicial process.”³⁵⁶ Agencies had “power far exceeding and different from the conventional judicial modes for adjusting conflicting claims.”³⁵⁷ Their functions in modern government “preclude[d] wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts.”³⁵⁸ Congressional, not judicial, supervision was the remedy for abuses: “Congress . . . must be trusted to correct whatever defects experience may reveal. Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies.”³⁵⁹

Just months after Hughes’s retirement, Justice Reed’s opinion for the Court in *Gray v. Powell*³⁶⁰ embodied the Supreme Court’s view of administrative agencies and sounded all the themes Progressives had articulated.³⁶¹ The case involved the Bituminous Coal Division of the Department of the Interior, which regulated coal production by setting prices. The statute governing the Division provided an exemption for coal “produced” by the entity that used it.³⁶² The Seaboard Air Line Railway Company (Seaboard) leased several mines from their owners, paying a rent measured by the amount of coal Seaboard took from the mines. Seaboard then hired an independent contractor to operate the mines and deliver the coal to it. The mine operator received a flat rate per ton of coal from Seaboard, thus, as Justice Reed’s opinion observed, bearing “all the risks of operation.”³⁶³ The Bituminous Coal Division found that Seaboard was not a “producer” exempt from regulation.³⁶⁴ When the case reached the Supreme Court, a majority accepted the Division’s conclusion.³⁶⁵

Three dissenters argued that the case involved a straightforward question of statutory interpretation: what did Congress mean when it said that “producers” of coal for their own use were exempt from regulation? Justice Reed saw the issue differently. For him, “[T]he

356. *Id.* at 142.

357. *Id.*

358. *Id.* at 143.

359. *Id.* at 146.

360. *Gray v. Powell*, 314 U.S. 402 (1941).

361. *Id.* at 412. Justice Jackson did not participate in the decision. *Id.* at 417.

362. *Id.* at 415.

363. *Id.* at 409.

364. *Id.* at 406.

365. *Id.* at 415.

function of review placed upon the courts . . . [was] fully performed when they determine[d] that there ha[d] been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner.”³⁶⁶ That “usual administrative routine” resulted from Congress’s decision to “delegate” the decision to exempt some producers from regulation “to those whose experience in a particular field gave promise of a better informed, more equitable, adjustment of the conflicting interests.”³⁶⁷ Contractual arrangements and ownership were the poles of a continuum between which were “innumerable variations,” and “[t]o determine upon which side of the median line the particular instance falls calls for the expert, experienced judgment of those familiar with the industry.”³⁶⁸ Committing this kind of decision to “specialized personnel” was “a familiar practice.”³⁶⁹ Justice Reed concluded, “It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere factfinding bodies deprived of the advantages of prompt and definite action.”³⁷⁰ As law professor Ray Brown wrote, “[I]n this decision . . . , the old law and fact criterion . . . has given way to the pragmatic test—which body, court or administrative agency, has the better expert qualification for deciding the issue presented.”³⁷¹ The Progressive theorists of administrative law could not have put it better.

Pottsville and *Gray* show that the Supreme Court had come to accept nearly the full Progressive vision of administrative law. But that vision was undergoing some transformation. Progressive theorists of administrative law had added an important supplement to their earlier emphasis on expertise alone. The procedures used by administrative agencies would, as Gellhorn put it, democratize the agencies by making them—rather than, or at least in addition to, Congress—the forums for pluralist bargaining among affected interest groups. Agencies would serve as the representatives of the

366. *Id.* at 411.

367. *Id.* at 411–12.

368. *Id.* at 413.

369. *Id.* at 412.

370. *Id.* at 413.

371. Ray A. Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899, 926 (1943).

public rather than, or at least in addition to, serving as the vehicles of disinterested professional expertise.³⁷²

The Supreme Court began to accept the pluralist defense of agencies in an important decision dealing with who could challenge administrative action. In the early years of administrative law, courts allowed regulated entities—those whose legal rights were affected—to obtain judicial review of agency action.³⁷³ The notion of “affecting legal rights” necessarily required some baseline to identify the legal rights, and courts found that baseline in the common law.³⁷⁴ In the ordinary case this posed no difficulties. But as agencies began to dispense valuable benefits, things changed. Recipients of licenses were happy to receive them; their competitors were unhappy. Traditional common law doctrine held, though, that no one had a legal right to be free from competition.³⁷⁵ Consider an agency that awarded a license based on a mistaken view of the law, to the disadvantage of a competitor. With the common law as a baseline, the competitor could not challenge the agency’s action, and lawlessness would go unchecked.³⁷⁶

In *FCC v. Sanders Bros. Radio Station*,³⁷⁷ decided in 1940, the Supreme Court addressed this problem and expanded the class entitled to challenge agency action as unlawful. The FCC awarded a new license to operate a radio station in Dubuque, Iowa.³⁷⁸ A

372. See GELLHORN, *supra* note 82, at 122 (“I submit[] that administrative bodies can and very frequently do democratize our governmental processes. They can and do bring to the interests and individuals immediately affected an opportunity to shape the course of regulation, modeling it to fit the contours of their own special problems. The administrative agency is providing badly needed machinery enabling the average man ‘to meet government upon his own level and speak to the governors in the language of his profession or business.’” (quoting E. PENDLETON HERRING, *PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST* 19 (1936)) (internal quotation marks omitted)).

373. See Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1135 (2009) (“[T]he challenger had to identify injury to a ‘legal right’ . . . to establish standing to challenge administrative action.”).

374. *Id.* at 1136.

375. See *Alexander Sprunt & Sons, Inc. v. United States*, 281 U.S. 249, 254–55 (1930) (reasoning that although the plaintiffs’ “competitive advantage was threatened. . . that interest alone did not give them the right to maintain an independent suit”); see also Magill, *supra* note 373, at 1138 (observing that “[t]he elimination of [a] competitive advantage . . . compromised [no] legal rights” and thus did not confer standing).

376. Cf. *Edward Hines Yellow Pine Trs. v. United States*, 263 U.S. 143, 148–49 (1923) (holding that a group of lumber manufacturers and dealers lacked standing to challenge the ICC’s decision to cancel a “penalty charge” on their competitors).

377. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

378. *Id.* at 471.

competing radio station across the Mississippi River intervened in the FCC proceeding, contending that the area could not generate enough advertising revenue to support two stations.³⁷⁹ The FCC disagreed, and the competitor went to court.³⁸⁰

A unanimous Supreme Court held, first, that the competitor was entitled to seek judicial review of the agency's decision even though it had suffered no injury to a right protected by the common law. The Court then held that the statute did not require the FCC to take competitive injury into account when awarding licenses.³⁸¹ The statute gave a right to seek review to "any . . . person aggrieved or whose interests are adversely affected" by agency action.³⁸² A radio station already operating in an area was "adversely affected" when a new station started to operate, even though it was not protected from competition by the common law.³⁸³ Congress, the Court held, could give competitors a right to obtain judicial review because "[i]t may have been of [the] opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law" in the agency's action.³⁸⁴

Sanders Bros. exposes several aspects of administrative law near the end of Hughes's tenure. By expanding the class of entities entitled to seek judicial review of agency action, the Supreme Court gave the courts a continuing role in supervising the administrative state. Although competitors might not have standing to challenge the constitutionality of *statutes* that put them at a competitive disadvantage,³⁸⁵ they could challenge agency decisions doing so. Sanders Brothers's intervention in the FCC proceeding confirmed that the agency was a venue for the kind of give and take among interest groups that had become characteristic in modern legislatures. Indeed, one might see the standing decisions near the end of the

379. *Id.* at 471–72.

380. *Id.* at 472.

381. *Id.* at 473–74.

382. *Id.* at 476.

383. *Id.* at 477.

384. *Id.* Justice McReynolds did not participate in the decision. *Id.* at 478.

385. See *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 140 (1939) (holding that the appellant's argument that the statutes at issue were unconstitutional "is foreclosed by prior decisions that the damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, and will not support a cause of action or right to sue").

Hughes Court as suggesting that the location of pluralist give and take had shifted from the legislature to the agencies.

III. ADMINISTRATIVE LAW OUTSIDE THE SUPREME COURT

Progressive administrative law theory seemed to have triumphed in the Supreme Court. But the story in the organized legal profession and in Congress was a less happy one for Progressives. This Part concludes the examination of administrative law in the 1930s by describing the political reaction to the developments in the Supreme Court, a reaction so hostile to the Progressive vision that Progressive scholars perhaps should have reevaluated their criticisms of the Court's decisions. If their opponents thought that drastic changes were needed in administrative law, the Progressives might have said to themselves, perhaps the Court had given them a great deal of what they wanted.

Administrative law in the 1920s and early 1930s embodied a compromise among Progressive advocates of administrative autonomy, courts concerned about preserving traditional safeguards of individual rights (and their own power), lawyers who sought to preserve their role in the new administrative order by insisting that it have some degree of legalization, and corporate interests who saw in administrative law an acceptable tradeoff between the costs of adjudication and expeditious disposition of cases. That compromise came under pressure in the 1930s. The administrative state expanded dramatically, creating constituencies supporting the new bureaucracies and, not incidentally, supporting the Roosevelt administration. The Supreme Court increasingly accepted the Progressive vision of administrative law, and a new cadre of lawyers moved into the nation's administrative bureaucracies, forming a counterweight to the segments of the bar representing corporate interests. The traditional elite bar sought to reestablish the older equilibrium by supplanting administrative law as developed by the Supreme Court with a more comprehensive statutory framework.

Dismayed by what he took to be the influence of political patronage on awarding radio licenses, which he had observed after he served as the first general counsel to the FCC, Louis G. Caldwell persuaded the American Bar Association's (ABA) president to appoint a special committee on administrative law to examine the

role lawyers and courts could play in controlling agencies.³⁸⁶ Caldwell became the new committee's chair just as the New Deal invigorated administrative government.³⁸⁷ The committee's initial forays were quite modest, turning the Progressive theory of the administrative state guided by science and expert knowledge to its own purposes by proposing that Congress create a specialized and expert administrative court with, however, a quite limited jurisdiction.³⁸⁸ This proposal was the hobbyhorse of Kentucky "colonel" Ollie Roscoe McGuire, a self-promoting critic of the New Deal who had collaborated with James M. Beck on a book whose title—*Our Wonderland of Bureaucracy*—suggests its argument.³⁸⁹ McGuire occasionally framed his quite modest proposal with references to "[d]ictators [who] may walk across the stages of foreign lands," but his rhetoric outran his proposal.³⁹⁰ McGuire also got the ear of Senator Mills Logan of Kentucky,³⁹¹ who had served as that state's chief justice for a few months before his election to the Senate.³⁹² Logan regularly introduced bills brought to him by McGuire dealing with administrative law, seeing them as compatible with Logan's general support for the New Deal.³⁹³

McGuire took over as chair of the special committee in 1937, and began a campaign for more substantial revisions in administrative law.³⁹⁴ The committee proposed that all administrative agencies adopt highly judicialized internal mechanisms of review, with deferential judicial review to follow.³⁹⁵ The ABA endorsed these proposals in principle in 1937, although only after Washington lawyers had restructured them to exempt the most established agencies from their

386. This discussion draws heavily on Daniel R. Ernst, *Roscoe Pound and the Administrative State* (forthcoming) (on file with the *Duke Law Journal*).

387. *Id.* (manuscript at 26).

388. *See id.* (manuscript at 16) (explaining Pound's belief that lawyers "should use 'the new economics and the social science of today' to renovate the common law" (quoting Roscoe Pound, *Justice According to Law*, 14 COLUM. L. REV. 103, 117 (1914))).

389. *Id.* (manuscript at 28).

390. O.R. McGuire, *Federal Administrative Action and Judicial Review*, 22 A.B.A. J. 492, 492 (1936).

391. *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1578 (1996).

392. Logan, *Marvel Mills*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=L000404> (last visited Feb. 27, 2011).

393. For a more detailed description of one of the proposals, see O.R. McGuire, *Proposed Reforms in Judicial Reviews of Federal Administrative Action*, 19 A.B.A. J. 471 (1933).

394. Ernst, *supra* note 386 (manuscript at 28–29).

395. *Id.* (manuscript at 30).

requirements.³⁹⁶ Dismayed at the direction the committee had taken, Arthur Vanderbilt, the ABA's president-elect in 1936, replaced McGuire as committee chair with Roscoe Pound,³⁹⁷ who had recently stepped down as dean of Harvard Law School.³⁹⁸ Pound had a reputation as a Progressive-era defender of administrative governance, which he understood as embodying the compromise between technical expertise and lawyers' influence on agency procedures.³⁹⁹

The special committee's report had a schizophrenic character. Its "general report," Pound's distinctive contribution, offered a pointed attack on "administrative absolutism" bolstered by references to practices around the world.⁴⁰⁰ Punctuated by important insights into the real world of administrative action, the general report's intellectual force was undermined by its use of the term "administrative absolutism" to describe the strongest versions of the Progressive theory of administrative law. This failed to acknowledge that, whatever their aspirations, the Progressive theorists had come to an accommodation with the Diceyan tradition. That accommodation, indeed, might have been seen in the committee's recommended statute, which was hardly commensurate with this critique, and even the committee's discussion of the statute was significantly qualified.

The committee rejected the "reactionary position" of eliminating large amounts of administrative decisionmaking, but "insist[ed]" that "safeguarding individual interests and preserving the checks and balances inherent in the common law doctrine of the supremacy of law" was consistent with the "large and . . . increasing rôle" of such decisionmaking.⁴⁰¹ Because "[a]dministration, with its ideal and function of getting things done," had "a tendency to act from one side," it needed to be balanced from the other.⁴⁰² Drawing upon

396. *Id.* (manuscript at 19–20).

397. *Id.* (manuscript at 33).

398. *Id.* (manuscript at 28).

399. *See id.* (manuscript at 100) ("The early Pound thought that courts had 'tied down administration too rigidly' in the nineteenth century. . . . Pound wanted 'a simple, direct, and inexpensive mode of review,' not to substitute the discretion of the administrative body but to ensure that administrators 'hear both sides, act upon evidence and keep within the limits of the law.'" (quoting Letter from Roscoe Pound to Francis E. Walter (May 18, 1939))).

400. *See Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 342–45 (1938) (arguing that administrative absolutism is antithetical to American governmental values by offering Soviet Russia, Australia, and England as counterpoints).

401. *Id.* at 342.

402. *Id.*

Progressive ideas about modern society, the committee continued, "The more complex a society, the more and more numerous and complex the relations and groups and associations of which it is made up, the more complicated becomes the task of adjusting their conflicting and overlapping interests and clashing activities."⁴⁰³ This could not be achieved within the administrative structure, contrary to the position taken by administrative absolutism, which maintained the "ideal" of "a highly centralized administration set upon complete control of the executive for the time being, relieved of judicial review and making its own rules."⁴⁰⁴ Composed of practicing lawyers and an academic no longer attuned to developments in the American theory of administrative law, the committee did not glimpse, as Gellhorn would, the outlines of a reconfiguration of administrative law in its third phase as providing a location within the administrative state for pluralist bargaining.

The committee then mounted a challenge to the heart of the Progressive vision of administrative agencies. Quoting Landis on the "scientific" character of administrative inquiries, the committee used the example of the NLRB to question the idea that administrative hearings were calm and uncontentious. It also used that same example and that of deportation hearings to question the idea that administrative decisionmaking was "inherently scientific."⁴⁰⁵ These observations supported the committee's regular description of agencies as under executive rather than professional or expert control: "[t]he postulate of a scientific body of experts pursuing objective scientific inquiries [was] as far as possible from what the facts [were] or [were] likely to be in a polity where the administrative bodies [were] . . . both by tradition and by legislation . . . subjected to centralized executive control."⁴⁰⁶ For the committee, "In many fields of administration there [was] no particular expertness," whether at the level of the line officials charged with direct administration or at the level of the agency heads appointed for political reasons.⁴⁰⁷ "The professed ideal of an independent commission of experts above politics and reaching scientific results by scientific means, ha[d] no

403. *Id.*

404. *Id.* at 343.

405. *Id.*

406. *Id.* at 344.

407. *Id.* at 345.

correspondence with reality.”⁴⁰⁸ The committee described how agencies were created to serve narrow political goals: “this very subjection to politics . . . [was] often not the least reason for setting up administrative agencies in the minds of those who wish[ed] to see some particular subject put under the control of some particular group or interest.”⁴⁰⁹

Against the false claims of administrative expertise, the committee set the professional standards of the legal profession and the judiciary. These standards offset “tendencies” in agency decisionmaking, such as decisions without a full hearing or decisions made on the basis of evidence not formally presented. The committee agreed that “agencies should not be held to purely judicial procedure,” particularly rules of evidence that had developed to regulate proceedings in which lay jurors were the decisionmakers.⁴¹⁰ That, though, made full judicial review even more important. Citing Sharfman’s praise of the Interstate Commerce Commission for “safeguard[ing] all essential rights and interests,” the committee said that there was “evidence” that this had occurred “largely because the courts have compelled the Commission to do so.”⁴¹¹

The report then shifted gears, defending the rise of the administrative state and criticizing “extreme” court decisions in the late nineteenth century that resulted in “[s]omething very like a paralysis of administration by judicial order or judicial review.”⁴¹² This “bad adjustment” resulted from “too much check upon administration,” followed by a “reaction” that provided no regularized accommodation of administration “as part of the legal order” and a failure of “systematic” allocation of authority between agencies and courts.⁴¹³ Rather than administrative absolutism, the solution lay in better court supervision of agencies. What was needed, the committee said, was “unification and simplification” of judicial review.⁴¹⁴ A single statute dealing with judicial review of agency action

408. *Id.* at 359.

409. *Id.* at 344.

410. *Id.* at 348.

411. *Id.* at 351.

412. *Id.* at 353.

413. *Id.* at 354.

414. *Id.* at 359.

should replace the confusing set of traditional remedies that had “grown up haphazard[ly].”⁴¹⁵

In 1938, Senator Logan introduced an even more modest version of his originally modest proposal for an administrative court, but members of the ABA special committee testified against it. The Roosevelt administration temporized. In early 1939, Attorney General Frank Murphy appointed a Committee on Administrative Procedure to assess the situation and, if appropriate, to propose new legislation. Gellhorn directed the committee’s research, which included interviews with agency heads and staff members. The staff regarded the ABA committee, and Pound in particular, as offering “reform” proposals that derived not from serious inquiry into the failings of the existing system but from political predisposition and prejudice.⁴¹⁶

The Attorney General’s committee faced a new threat, as the New Dealers saw things. Senator Logan had found an ally in the

415. *Id.* The committee’s proposed statute followed immediately after the general report, and anyone who read the material in the order presented would have been struck by the mismatch between the two. Some of its rhetoric aside, the committee’s general report was an astute and realistic treatment of the modern realities of administration, in contrast to the idealizations offered in the 1930s by the Progressive theorists of administrative law. Because it was produced by complex, almost desperate negotiations that Pound himself refused explicitly to endorse, the statute proposed in the committee’s report had little connection to that realism. As in previous incarnations, the recommended statute would require each agency head to appoint an “intra-departmental board” as an internal appeals panel, operating in the way a court would, with testimony, subpoena power, a right to cross-examination, and the like. *Id.* at 336. Here the special committee noted that “there [was] much to be said on both sides.” *Id.* Internal review could be “elastic” and would “regularize[] within the departments what is now largely the actual present procedure.” *Id.* at 336–37. Yet multiple levels of review were generally undesirable and might reinforce the idea that agency officials had the final word on their own actions. *Id.* at 337. Agency decisions would be subject to review in the U.S. Court of Appeals for the D.C. Circuit. *Id.* at 366. The standard of review was not significantly different from the one the Supreme Court had already developed: “[n]o decision . . . shall be set aside . . . unless it appears that the findings are clearly erroneous or are not supported by substantial evidence, or that the decision . . . is not supported by the findings, . . . or was based on arbitrary and capricious findings of facts, or . . . infringes the Constitution or statutes of the United States.” *Id.* at 367. The committee somehow understood this provision to be sufficient to combat administrative absolutism. The most that can be said for it is that the proposal made review of factfindings mandatory, not discretionary, and required more than “some evidence” to support such findings. *Id.* at 338. Seemingly aware of the mismatch between the rhetorical nervousness about administrative absolutism and the modesty of the actual proposals, the committee observed that its proposed standard of review “gives an enormous power to administrative officials . . . without the checks which operate in the case of the judge.” *Id.*

416. For a description of the committee’s work, see generally Kenneth C. Davis & Walter Gellhorn, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511 (1986).

House of Representatives—Francis Walter of Pennsylvania. The Walter-Logan bill, introduced in April 1939, rapidly gained ground in Congress. Unsurprisingly, testimony from twelve existing agencies opposed the bill. One testified that the bill's procedural proposals would “very seriously hamper the efficient operation” of the agencies.⁴¹⁷ The administration's efforts failed, and Logan reported the bill to the Senate, saying that the bill would “stem and, if possible, . . . reverse the drift into parliamentarism which, if it should succeed . . . , could but result in totalitarianism . . . with the entire subordination of both the legislative and judicial branches of the Federal Government to the executive branch.”⁴¹⁸ Representative Walter had his House committee approve the bill in late 1939. The committee report described some “bureaucrats” who were “contemptuous of both the Congress and the courts; disregardful of the rights of the governed; and for lack of sufficient legal control over them, a few develop Messiah complexes.”⁴¹⁹ New Dealer Representative Emmanuel Celler of New York filed a dissenting report, saying that it was wrong to adopt a general administrative law measure to deal with the isolated misdeeds of one or two agencies. Celler specifically mentioned the NLRB and the Labor Department's Wage and Hour Division.⁴²⁰

The debates over the bill's adoption made clear that the bill was a challenge to the New Deal. As the bill evolved, its coverage was restricted. Older agencies such as the ICC were exempted, leaving only the newer, New Deal agencies affected. As one opponent put it, the bill with its exemptions

[left] out those agencies that were built up back yonder to serve special interests . . . but when it [came] to those agencies that ha[d] been set up within the last ten years, . . . that gave the citizen some rights he should have enjoyed for the last 50 years, this bill would paralyze those agencies.”⁴²¹

Proponents referred to the need to prevent Roosevelt from becoming a dictator, and to the Soviet Union as the kind of nation that lacked

417. Shepherd, *supra* note 391, at 1559 (quoting the testimony of Chester Lane, General Counsel, SEC).

418. *Id.* at 1601.

419. *Id.* at 1604.

420. *Id.*

421. *Id.* at 1618 (quoting 86 CONG. REC. 5491 (1940) (statement of Rep. Rankin)).

protections like those in the Walter-Logan bill.⁴²² They criticized New Deal agencies for the very speed and efficiency that Progressive theorists of administrative law saw as among agencies' best characteristics.⁴²³ New Dealers in Congress tried to defeat the bill partly on the ground that it was a veiled attack on the New Deal, and partly because, they said, the Attorney General's committee was likely to produce a better proposal. The crucial vote in the House was on a motion to send the bill back to committee. The motion failed by a vote of 272 to 106, after which the House adopted the bill on April 18, 1940, by a vote of 282 to 96, with support from Republicans and some Southern Democrats. Senator Logan had died in October 1939, and the bill's passage in the Senate in November by a two-vote margin was something of a tribute to him.⁴²⁴

As he had promised, Roosevelt vetoed the Act when it came to his desk. He criticized both "lawyers [who] still prefer to distinguish precedent and to juggle leading cases rather than to get down to the merits," and "powerful interests which are opposed to reforms that can only be made effective through the use of the administrative tribunal."⁴²⁵ He said that he "could not conscientiously approve any bill which would turn the clock backwards and place the entire functioning of the Government at the mercy of never-ending lawsuits," and he expressed his hope that the Attorney General's committee would generate recommendations he could support.⁴²⁶ The House failed to override the veto.

The Attorney General's committee submitted its report a month later, in January 1941. Three of the committee's twelve members offered a statute that would require courts to reverse agency decisions that were "*clearly* contrary to the *manifest* weight of the evidence," rather than allowing them to affirm decisions using a nearly toothless

422. See *id.* at 1581 ("Because of developments in Europe, the fears that Roosevelt sought dictatorial powers were often real.").

423. See *id.* at 1590-91 ("Before, proponents of administrative reform had characterized their proposals as scientific, nonpartisan attempts to restore constitutional balance and to improve agencies' efficiency and accountability. Now, employing rhetoric that likened opposition to administrative reform to communism and fascism, Pound's committee attacked the New Deal agencies.").

424. *Id.* at 1619. For a summary of the debates, see *id.* at 1606-25.

425. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RETURNING WITHOUT APPROVAL THE BILL (H.R. 6324) ENTITLED "AN ACT TO PROVIDE FOR THE EXPEDITIOUS SETTLEMENT OF DISPUTES WITH THE UNITED STATES, AND FOR OTHER PURPOSES," H.R. DOC. NO. 76-986, at 3 (1940), reprinted in 86 CONG. REC. 13,943 (1940).

426. *Id.* at 3-4.

“substantial evidence” test. They also suggested that Congress should adopt a general statute dealing with administrative procedure, to be followed if necessary by modifications to deal with the peculiar requirements of specific agencies. The committee’s majority recommended a modest bill that would have restructured internal agency operations in some important ways but that said nothing about judicial review of agency decisions.⁴²⁷

CONCLUSION

The Progressive vision for administrative law had the courts withdrawing almost completely from the supervision of administrative agencies. As the Supreme Court gradually accepted most of that vision, it chose to give up its ability to control the direction of administrative law’s development. The parts of that forbearance that resulted from the constitutional transformation of 1937 were permanent. The parts that were “pure” administrative law—interpretations of the statutes establishing the agencies—were not. Congress could reverse the Hughes Court’s abandonment of judicial control over administrative law. Eventually it did. As of 1941, though, that outcome could only barely be seen.

427. COMM. ON ADMIN. PROCEDURE, FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at 211 (1941).